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In The

Supreme Court of the United States

October Term, 1996

CONFEDERATED TRIBES OF THE CHEHALIS INDIAN RESERVATION, SHOALWATER BAY INDIAN TRIBE,

Plaintiffs-Petitioners,

v.

STATE OF WASHINGTON; WILLIAM R. WILKERSON, individually and as Acting Director of the State of Washington Department of Fisheries; FRANK R. LOCKARD, individually and as Director of the State of Washington Department of Game; WASHINGTON STATE GAME COMMISSION,

Defendants-Respondents,

and

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF WASHINGTON,

Defendant-Appellee.

Joint Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals' err when it affirmed rather than remanding for further proceedings after holding that the district court had applied an incorrect legal standard to determine disputed factual questions as to whether the Executive Branch had reserved off-reservation fishing rights for the two Tribes?

2. Did the court of appeals err when it held that the mixed questions of law and fact present in the district court's findings of fact are subject to review under the clearly erroneous standard instead of granting de novo review?

3. Did the court of appeals' ruling that the petitioners herein are entitled to exercise off-reservation fishing rights under the Treaty of Olympia conflict with opinions of this Court defining the rights of Affiliated Tribes under that Treaty?

4. Did the court of appeals err when it failed to follow the decisions of this Court and found instead that the aboriginal fishing rights of petitioners had been extinguished?

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JOINT PETITION FOR WRIT OF CERTIORARI

Petitioners, the Confederated Tribes of the Chehalis Reservation (hereinafter "Chehalis") and the Shoalwater Bay Indian Tribe (hereinafter collectively "Tribes") request that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit which was entered on September 6, 1996. The ultimate question is whether these two Tribes enjoy off-reservation fishing rights to the same extent as twenty-one other previously adjudicated tribes in Western Washington.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 96 F.3d 334 (1996) and in Appendix A to this petition. The Order filed May 18, 1992 adopting the Magistrate's Report and Recommendation (Appendix B) and the district court's findings of fact and conclusions of law were filed May 29, 1992 (Appendix C).

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was filed on September 6, 1996. The petitioners herein filed a Petition for Rehearing and Suggestion for Rehearing en banc dated October 20, 1996. That Petition was denied by the Ninth Circuit Court of Appeals on November 21, 1996. See, Appendix E. The district court's Order

for Final Judgment filed March 8, 1995 was filed pursuant to Fed. R. Civ. P. 54(b). See, Appendix D.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, TREATY, EXECUTIVE ORDER AND FEDERAL RULE PROVISIONS

The text of the Shoalwater Bay Executive Order of September 22, 1866 is set forth in Appendix F. The text of the original order, as signed by President Johnson, was written by hand on a long sheet of paper which included a map of the Shoalwater Bay Indian Reservation including the surrounding marine waters. Appendix C-28. The Chehalis Executive Order of July 8, 1864 is set forth in Appendix G. The Treaty of Olympia, 12 Stat. 971 (July 1, 1855 and January 25, 1856 ratified March 8, 1859) is set forth in Appendix H.

STATEMENT OF THE CASE

A. Nature Of The Case

Petitioners seek review on three grounds. First, the Tribes seek review of the court of appeal's disposition of the Executive Order claim, which found against the Tribes even though it found that the district court had applied incorrect legal principles to the facts in determining whether the Executive had reserved off-reservation fishing rights for the two Tribes. The Tribes seek review of the issue of whether it was proper for the Ninth Circuit

to have affirmed the district court by engaging in its own fact finding review, rather than remanding for further proceedings, after the Circuit Court held that the district court had applied the incorrect legal principles at trial to disputed factual questions.

The Court should also grant review to correct the error by the Ninth Circuit in reviewing mixed questions of fact and law under the clearly erroneous standard. Rather, the court of appeals should have provided de novo review of the lower court's findings as to Executive intent to reserve off-reservation fishing rights.

The Court should also grant review to consider the Ninth Circuit's ruling on the Affiliated Tribes' claim. The Court of Appeals failed to give appropriate weight to the Supreme Court's opinion in *Halbert v. United States*, 283 U.S. 753 (1931) and its progeny. The Court of Appeals' decision is also in conflict with *Northern Arapaho Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987).

Finally, the Court should grant review concerning the Ninth Circuit's holding that the Chehalis aboriginal fishing rights was not preserved by the express agreement between the United States and the Chehalis Tribe in the settlement of the Indian Claims Commission case. The court's decision is in conflict with the rulings in *United States v. Dann*, 470 U.S. 39 (1985) and *Oregon Department of Fish v. Klamath Tribe*, 473 U.S. 765 (1985).

B. The Course Of The Proceedings Below

This case was originally filed by the petitioning Tribes as *Chehalis Tribes, et al. v. State*, No. C83-117T (W.D.

Wa.). The district court had jurisdiction pursuant to 28 U.S.C. 1331, 28 U.S.C. 1337, 28 U.S.C. 1343(a)(3) and 28 U.S.C. 1362. Following its filing, the case was partially consolidated with *United States v. Washington*, No. 9213 because of common issues concerning the allocation of fish caught by the Chehalis Tribe in the Chehalis River System between the Treaty and non-Treaty share.[1] *United States v. Washington* is the continuing litigation addressing the nature and extent of the Stevens' Treaty fishing rights of the tribes party to that case. *See, e.g., Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

The district court partially consolidated the cases in order to address the question of "what rights, if any, the Shoalwater Bay Tribe and the Chehalis Tribe have to take fish free of State regulation in the Chehalis River and Grays Harbor systems, in Willapa Bay and in the rivers and streams draining into that Bay and waters adjacent to that Bay." Order Re: Consolidation and An Order of Trial (May 20, 1987) at p. 2; Second Revised Order of Consolidation (Jan. 5, 1987).

The Magistrate Judge set a trial for October 15, 1990. The Magistrate Judge issued a Report and Recommendation, the Proposed Findings of Fact and Conclusions of Law and the Order Striking Motions. (hereinafter the

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[1] The issue of how to allocate the fish has not been finally resolved. The district court approved an interim allocation of the Chehalis (and Shoalwater Bay) catch, with 50% allocated to the Treaty share and 50% to the non-Treaty share. Second Revised Order of Consolidation at 2. Order (Feb. 27, 1989); Order Denying Motion for Partial Summary Judgment (June 29, 1989).

"Report"). (Oct. 3, 1991). On May 14, 1992 the district court adopted the proposed Findings and Conclusions with minor modifications. Order Re: Report and Recommendation Filed on October 3, 1991. (Appendices B, C). Following additional boundary dispute stipulations and determinations,[2] the district court granted the two Tribes' pending motion to certify an appeal on the issues decided to date. On March 21, 1995 the district court docketed the Partial Judgment in a Civil Case Pursuant to Fed. R. Civ. P. 54(b).

C. Statement Of Facts Material To Consideration Of The Questions Presented

1. The Shoalwater Bay Tribe And The Chehalis Tribe Are Federally Recognized Tribes Located Upon Indian Reservations

Both the Shoalwater Bay Tribe and the Chehalis Tribe are federally recognized Indian tribes with governing bodies recognized by the Secretary of the Interior. Pretrial Order (Sept. 18, 1990) (Admitted Facts) at 3, 4.[3] Both tribes have membership rolls adopted under the supervision of the Secretary of the Interior. Both Tribes are also recognized as the governing body of their respective reservations. PTO at 4 ¶ 6. The Shoalwater Bay

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[2] See Stipulation of Shoalwater Bay Tribe and the State of Washington concerning the Reservation waterward boundary (Jan. 18, 1993); Order Re: Chehalis Indian Reservation Boundaries (July 2, 1993).

[3] All references to "PTO" are to the Admitted Facts in the Pretrial Order in this case unless the reference is expressly to the contrary.

Indian Reservation was created by Presidential Executive Order on September 22, 1866. PTO at 3 ¶ 3; Exs. SH/CH-M-36, 37, 38. The Chehalis Reservation was created by Secretarial Executive Order on July 8, 1864. PTO at 4.

2. The Chehalis And Chinook Tribes In The 1850's And 1860's Were Fish-Eating Indians Who Occupied Areas Around Grays Harbor, Willapa Bay And The Lower Columbia River

The Upper and Lower Chehalis Tribes were similar to other tribes in Western Washington in terms of their culture, social and political organization. Like tribes who were parties to Final Decision No.1 in *United States v. Washington*, such as Muckleshoot and Nooksack,[4] the Chehalis were organized in villages united by family ties through the practice of exogamy. *Chehalis Tribe et al. v. United States*, 155 F. Supp. 226, 228 (Ct. Cl. 1957); See also, Lane Statement at 8.[5] The Chehalis were dependent upon fish like other Indians in Western Washington.

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[4] Both Muckleshoot and Nooksack were held to be successors in interest to tribes, bands and villages of Indians. *United States v. Washington*, 384 F. Supp. at 365-366; 459 F. Supp. at 1041.

[5] Based upon the analysis of Dr. Lane and that of Drs. Thompson and Holden, as early as the Chehalis River Treaty Council, substantially all of the Upper Chehalis bands and groups and several lower Chehalis bands and groups expressed the desire to have a reservation at the confluence of the Black and Chehalis Rivers. By 1859, the United States Government had tentatively set aside land at the confluence of the Black and Chehalis Rivers and was discouraging non-Indian settlement in the area. Moreover, between 1864 and the 1870s, certain Upper Chehalis tribes and bands, Satsop, Wynoochee, Kwalioqua/Willapa and Cowlitz groups and bands came to the Chehalis

Bands of the Chehalis and Chinook Tribes which make up the Shoalwater Bay Tribe were living on Willapa Bay in the 1850's and 1860's. Tr. at 78; Ex. USA-M-42. A letter from Indian Agent Tappan on September 30, 1854 noted that a "band of this tribe" (Chinook Tribe) "though somewhat mixed with the Chehalis Tribe, make their homes at Shoalwater Bay." Exs. USA-M-106 and QN-M-124; quoted at trial by Dr. Lane, Tr. at 81. These Indians were "sometimes referred to as the Shoalwater Bay Indians, sometimes referred to as Chinook, and sometimes referred to as mixed Chehalis and Chinook." *Id.* at 79. *See also*, Ex. SH/CH-M-111. The Chehalis and Chinook bands around Shoalwater Bay were organized around villages in a manner similar to other tribes in Western Washington in the mid-nineteenth century. Exs. SH/CH-M-103, 216, 66; Tr. at 82-84; 89-90.

3. The Shoalwater Bay And Chehalis Tribes Were Dependent Upon Fish For Their Livelihood

The Ninth Circuit held that the petitioners are "fish-eating" Indians. Appendix A-9; 96 F.3d at 337. The native economy of the Shoalwater Bay Tribe in 1866 was based upon fish. Lane Report at 1, Ex. USA-M-42. Superintendent Waterman, in his letter of June 1, 1866 recommending the Shoalwater Bay Indian Reservation, stated that these Indians " . . . have always lived upon the beach and

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reservation in an organized fashion to live on the reservation and fish at their usual and accustomed fishing grounds and stations off the reservation. As with the predecessors to the Shoalwater Bay Tribe, these predecessors to the Chehalis tribe were organized into villages in a manner similar to other tribes in the mid-19th century.

subsisted themselves upon fish, clams, oysters, and sea animals." Waterman Letter, quoted in Lane Report at 39, *supra*, Ex. USA-M-42.

Dr. Lane, witness for the United States, emphasized, in her statement, the importance of salmon to the aboriginal tribes discussed herein including the Upper and Lower Chehalis Tribes:

> The basis of their subsistence was fish, primarily salmon: 'The most important food, however, was salmon, and the salmon runs were the significant events of the year.' (Fried 1974: 221)

Id. at 8. During the fishing season the Chehalis followed the salmon to sites within their territory and to locations outside their area. *Id.* "Winters were spent in villages consisting of one or more multifamily houses usually located at sheltered sites on river banks." *Id.* There were local variations since people near the "sea coast more intensively utilized marine resources" but all were dependent upon salmon and steelhead. *Id.*

Similarly, the Chinook and mixed Shoalwater Bay Tribes were dependent upon fish. Dr. Lane testified at trial that, as to the Shoalwater Bay Tribe in the 1850's and 1860's:

> These people were very much like the rest of the people in Western Washington. Some of them lived on or near the salt water and had a more marine adaption in terms of their economy and their lives. Some of them lived farther upstream and had a more inland adaption. But basically they were like the rest of the people in Western Washington, given that qualification.

Tr. at 87; and *see*, Tr. at 90.

4. The Chinook And Lower Chehalis Tribes Signed The Unratified Dart Treaties With The United States Which Sought Among Other Things To Set Aside An Indian Reservation At The Site Of Their Valuable Fisheries And Homes At Willapa Bay

The history of United States' relations with the petitioners from the early 1850's through the period of the creation of each Reservation by Executive Order evidences a continuing intent on the part of the United States and the Tribes to create reservations with access to all the traditional fisheries of each Tribe to insure the welfare of the members of each Tribe. The history of the United States relations with the Chehalis and Chinook Tribes can be traced to the very beginnings of the United States government presence in the Pacific Northwest before the exclusion of the Russian, British and other European governments. Dr. Anson Dart negotiated a series of treaties in 1851 at Tansey Point on the Lower Columbia with ten bands of Chinook Indians although these treaties were never ratified. Lane Rept., Ex. USA-M-42 at 3. The Chinook bands did not want to leave their homes so the "Dart treaties provided these bands with small reservations in their respective territories." Ex. USA-M-42 at 3. George Gibbs[6] recommended this proposed reservation because it was deemed suitable for the Indians. Ex. USA-M-42 at 6; Letter from Gibbs to Secretary of the Interior, June 25, 1850, Ex. USA-M-43. The

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[6] George Gibbs assisted Governor Stevens in the negotiation of the later treaties, including the one at the Chehalis River Treaty Council. Ex. USA-M-42; 384 F. Supp. at 356-357.

Ninth Circuit found that the unratified Dart Treaties were intended to reserve fishing rights for the Shoalwater Bay Indians on the rivers which empty into Willapa Bay. 96 F.3d at 343.

The treaties were not ratified because the government wanted to move the Shoalwater Bay tribes and bands to the north of Willapa Bay or east of the Cascades. However, the Shoalwater Bay Indian tribes wanted to remain at a reservation at Shoalwater Bay where some of their traditional fisheries were located. Lane Rept. at 9.

5. The Chehalis River Treaty Council And Subsequent Events

Following the negotiation of the Dart Treaties, "the Chinook Indians continued to occupy their villages at Shoalwater Bay and to rely on the fisheries and other foods available in the bay and surrounding area." Ex. USA-M-42. Four years after the unratified Dart Treaties were signed, the United States again tried to negotiate a treaty with the Indian tribes of Southwestern Washington at the Chehalis River Treaty Council. Appendix A-10; 96 F.3d at 338. The tribes who attended the Chehalis River Treaty Council included the Upper and Lower Chehalis, Satsop, Lower Chinook, Kwalioqua/Willapa, Cowlitz, and Quinault tribes. PTO at 5, ¶ 12; Lane Statement at 16; Thompson Statement at 5.

The Council proceeding failed to result in a treaty. The primary reason for this failure was Governor Stevens' refusal to compromise with the tribes and set aside reservations for them in their traditional areas. Tr. at 105, 110-111. At that Council, Governor Stevens would

agree only to locate the tribes upon one reservation north of Grays Harbor near the site of the present day Quinault Reservation. PTO at 5, ¶ 13; Lane Rept. at 20.

The tribes were, by contrast, willing to compromise and offered at the Treaty Council to settle for just two reservations. Tr. at 105. The Indians at the Council specifically asked for reservations at Shoalwater Bay and at the confluence of the Black River and Chehalis Rivers, both near important fisheries and each centrally located for travel to other important traditional fishing sites. Tr. at 109. Later, of course, the United States reserved each of these locations by the Executive Orders which form one of the bases of the Tribes' claims here. Tr. at 110. By refusing to provide the Tribes with the reservations as originally requested, Governor Stevens failed to carry out his instructions to treat with the Indian tribes of the Northwest. Tr. at 110-111.

Later in 1855, following the United States' failure to conclude a treaty at Chehalis River, the United States signed the Treaty of Olympia with Quinault and Quileute. Appendix A-10. After the Treaty of Olympia was signed, the United States and its officials spent the next ten years attempting to complete the reservation process and provide for the fishing and living needs of the other Indian tribes of Southwestern Washington. The record shows that the United States abandoned the attempt to move the Chehalis, Shoalwater Bay, and Chinook Tribes north to the Quinault River. Rather, the United States undertook a variety of other means to reserve the Tribes' fisheries, including affiliation with Quinault under the Treaty of Olympia and the creation of separate reservations in their aboriginal territories. This

culminated in the creation of the Chehalis and Shoalwater Bay Indian Reservations in the 1860's and in the expansion in 1873 and subsequent allotment in the early 1900's of the Quinault Reservation. *See*, generally Lane Rept. at 22-43.

Immediately after the Chehalis River Treaty Council, Governor Stevens retreated from his position that the tribes of Southwestern Washington had to move to one reservation at Quinault. In the Treaty of Olympia, Governor Stevens added a proviso that more than one reservation could be established. Tr. at 1055-1057; Lane Rept. at 23, Ex. USA-M-42; See Appendix H.

As the Ninth Circuit noted, Governor Stevens also issued instructions in May 1855 to Simmons, special Indian agent, about future negotiations to set aside reservations for the Shoalwater Bay, Chinook, and Chehalis Tribes which would include "fishery and potatoe grounds." 96 F.3d at 343, Appendix A-25; Tr. at 1057. This letter showed Stevens' intent to treat with the Chehalis and the other Tribes which were at the Chehalis River Treaty Council and Stevens' May 3, 1855 letter evidenced an intent that, when the Shoalwater Bay Tribe received a reservation, the reservation would include a fishery. Tr. at 929, lines 15-20; Tr. at 1057-1058.

6. The United States' Creation Of The Shoalwater Bay And Chehalis Reservations

The Shoalwater Bay Reservation was recommended by a local resident and government agent named Giles Ford to provide a home and fisheries for the tribes who remained at Willapa. Ex. SH/CH-M-34. Ford stated that:

> I have visited Shoalwater Bay and examined the Spot that the Indians wish reserved for them: being situated in close proximity to good fishing, hunting, and grazing grounds. And I would recommend that it be immediately reserved from Sale.

Id. Ford to Waterman, May 2, 1866. The location of the site of the Reservation proposed by Ford was then based upon requests to him from the local Tribe. Tr. at 117-118; Ex. SH/CH-M-36.

Ford's recommendations incorporating the local Tribe's preferences, were sent to Waterman, the Superintendent for Indian Affairs in Olympia. Waterman, in turn, sent the recommendations to the Secretary of the Interior and the Commissioner of Indian Affairs. Tr. at 119; Ex. SH/CH-M-35, 36. Waterman's letter stated that:

> I herewith inclose a letter from Giles Ford Esqr together with a map showing the situation of the land referred to by him as the tract desired by the Indians on Shoalwater Bay. These Indians said to consist of some 30 or 40 families have always lived upon the beach and subsisted themselves upon fish, clams, oysters and sea animals. They are unwilling to abandon their former habits of life and turn their attention to agriculture. They desire a place upon the shore where they can fix their homes, without being exposed to be supplanted and driven off by white men. This tract which they have selected is a sand beach yielding some grass for the pasturage of their horses but of little value for cultivation. And it is my judgment that reserving it for the use of the Indians would work no injury to white men, but would have a tendency

> to promote peace between them and the Indians and would secure the contentment and well being of the latter. I therefore beg leave respectfully to recommend that the tract of land selected by Mr. Ford and designated upon the inclosed map be reserved for the use of the Indians.

Waterman to Smith, June 1, 1866, Ex. SH/CH-M-35. The recommendations from Giles Ford were approved by the Secretary of the Interior and sent to the President. Lane, Tr. at 119; Ex. SH/CH-M-36.

President Johnson signed the Shoalwater Bay Executive Order on a long sheet of paper which included what he described in the Order as a "diagram" of the Reservation and the surrounding area. Lane, Tr. at 119; (Presidential Executive Order) Ex. SH/CH-M-37. The Executive Order set aside the Reservation for "Indian purposes as recommended by the Secretary of the Interior in his letter of 18th inst. . . . ". *Id.* The Executive Order itself thereby expressly incorporated these letters of recommendation for the Reservation into it. Appendix F.

The history of the formation of the Chehalis Indian Reservation is equally compelling. By 1859, the United States continued to evidence its intent to provide a home for the bands and groups which ultimately became the Confederated Tribes of the Chehalis Reservation by setting aside through public notice certain lands at and around the confluence of the Black and Chehalis River for a reservation. *See,* Lane Statement at 36. It is clear that throughout the period after 1859, tribes, groups, and bands began to move to this area.

By 1864, non-Indian settlement pressure in the area was beginning to increase. In order to insure the Tribe's rights, provide a home, and allow the Indians a place from which to maintain their livelihood of fishing at their usual and accustomed grounds and stations, the United States Government, through its representatives, transmitted the communication of May 17, 1864 to the Secretary of the Interior recommending that the lands in question be set aside for the future home for the Chehalis Indians. Ex. SH/CH-M-251.20. This recommendation was incorporated within the Executive Order which set out the metes and bounds description of the Reservation at the exact location previously selected by the Indians at the time of the Chehalis River Treaty Council and subsequently identified by the United States through its newspaper notices. Appendix G. This location was in close proximity to a number of important Upper Chehalis villages, was located near major traditional fishing sites and provided easy access for the bands and tribes which came to the Reservation to their other traditional fishing sites down river along the Chehalis River system, in Grays Harbor and Willapa Bay.

REASONS FOR GRANTING THE WRIT

A. This Decision Conflicts With Decisions Of This Court Since The Ninth Circuit Affirmed The District Court, Rather Than Remanding For Factual Findings, After The Court Of Appeals Had Decided That Incorrect Legal Standards Had Been Applied By The District Court In Resolving Disputed Factual Issues.

1. The Ninth Circuit Affirmed Even Though It Found That The District Court Had Applied The Wrong Legal Standards.

The Ninth Circuit agreed with the Tribes that the district court applied the wrong legal standards in its Conclusion of Law No. 21 (Appendix C-41; ER 956) in deciding that the Executive Orders did not reserve off-reservation fishing rights for the two Tribes. 96 F.3d at 342 and n.2; Appendix A-21.[7] The Tribes had argued to the Ninth Circuit that the district court had incorrectly relied in Conclusion of Law No. 21 upon *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) by requiring that the Tribes show that, in order to prevail, there had to be an "express" reservation of a right to take fish off-reservation. The Ninth Circuit held that the district court was wrong in requiring that "off-reservation fishing rights must be expressly reserved." *Id.* The Ninth Circuit held

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[7] Conclusion of Law No. 21 was the only conclusion of law identified for the Executive Order claim by the district court. Appendix C-41. The district court prepared separate conclusions of law for each of the four claims. *Id.* at C-31 to C-45. None of the conclusions of law are applicable to all claims with the exception of the summary, Conclusion of Law No. 36.

that, since both the Shoalwater Bay and Chehalis Reservations were created before statehood, "the general rule of *Mescalero* has little bearing on the question of whether *implied rights arise from the executive orders creating these reservations.*" *Id.*, 96 F.3d at 342 n.2. (emphasis added); Appendix A-21.

The Ninth Circuit nevertheless independently affirmed stating that, although the district court based its "rejection of the Tribes' rights on an incomplete review of the law applicable to executive order reservations, it also based its rejection on separate and independent findings of historical fact." 96 F.3d at 342; Appendix A-22. The Court indicated that it could still affirm since it appeared that the district court "conducted the inquiry required in *Colville Confederated Tribes.*" *Id.*[8] The Ninth Circuit then reviewed the district court's findings of fact as to the Executive Order claim and affirmed. The Ninth Circuit quoted from findings of fact as to the ultimate question for both Tribes of whether an Executive or Indian intent to reserve an off-reservation fishing right was present. 96 F.3d at 342-343; Appendix A-22 to A-24. As to the Shoalwater Bay Indian Reservation, the Ninth Circuit went on to find that:

> *The record does reveal some evidence suggesting an intent on the part of the government to provide off-reservation fishing for the Shoalwater Bay Indians.* For example, the failed Dart treaties contemplated fishing rights for the Shoalwater Bay Indians at the rivers emptying into the Bay. And in 1854, Indian Agent W.H. Tappan wrote to

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[8] The *Colville Confederated Tribes* case is *Colville v. Walton*, 647 F.2d 42 (9th Cir. 1981) *cert. denied*, 454 U.S. 1092 (1981).

> Governor Stevens that "[the Indians] at Shoalwater Bay should have free access to the clam and oyster banks and to the fisheries of the Chehalis and Columbia rivers." Letter from Tappan to Stevens, Sept. 30, 1854. After treaty negotiations at the Chehalis River Council failed, Governor Stevens instructed Indian Agent Simmons to negotiate treaties with the remaining non-treaty Indians in Southwest Washington, saying "[t]he Chinooks, Shoalwater Bay and Lower Chehalis may be informed that their reservation will be selected so as to provide them with fishery and potatoe grounds." Letter from Stevens to Simmons, May 3, 1855.

Appendix A-24; 96 F.3d at 343 (emphasis added).

The Ninth Circuit's citations were not to findings of fact of the district court but to documentary evidence admitted at trial. The Ninth Circuit went on, however, to affirm applying the "highly deferential clear error standard." *Id.*

2. The Ninth Circuit's Opinion Conflicts With The Principle That The Tribes Are Entitled To Have The District Court Review The Case Based Upon The Correct Legal Standards.

The Ninth Circuit incorrectly decided to affirm the district court even though it had just decided that the district court had applied incorrect legal standards to reach the lower court's findings of fact. Since the Ninth Circuit held that the district court's findings of fact were based upon incorrect legal standards, the correct undertaking would have been to remand to allow the district court to reconsider the case.

This Court has held that "where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) (citation omitted); *DeMarco v. United States*, 415 U.S. 449 (1974) (per curiam); *Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970).[9]

In *Pullman-Standard* this Court criticized the same treatment of a district court decision at issue in the instant case. The only difference was that the Court of Appeals in *Pullman-Standard* reversed after making new factual findings, rather than affirming, after holding that incorrect legal standards had been applied by the district court. This case presents an opportunity to examine the application of this doctrine in the context of an affirmance by a circuit court. This case also provides a vehicle by which the Court can clarify the respective duties of the district and appellate courts in this situation.

In *Pullman-Standard* the Fifth Circuit Court of Appeals had at various points held that the district court had committed legal error in its ruling. *Id.*, 456 U.S. at 282-283, 287 n.17. Based upon its view of the correct legal standards the Fifth Circuit rejected the district court's findings and made its own findings as to whether the seniority system at issue violated Title VII. 456 U.S. at 284. The Fifth Circuit held that it could do so since, if findings are made under "an erroneous view of controlling legal principles, the clearly erroneous rule does not

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[9] Commentators have also noted that "[i]nsofar as a finding is derived from the application of an improper legal standard to the facts, it cannot be allowed to stand." Wright & Miller, *Federal Practice and Procedure*, Vol. 9A, Sec. 2585 at p. 574 (1995).

apply, and the findings may not stand." 456 U.S. at 285 quoting 624 F.2d at 533, n.6.

This Court reversed holding that the Fifth Circuit had erroneously made factual findings. The Court held that it was error for the Fifth Circuit to have decided that the district court had made erroneous findings. 456 U.S. at 287. The Court went on to hold that the Court of Appeals also committed error because " . . . after holding that the District Court had failed to consider relevant evidence and indicating that the District Court might have come to a different conclusion had it considered that evidence, [it] failed to remand for further proceedings . . . " 456 U.S. at 292.

The rule in *Pullman-Standard* applies here to require a remand. There is no dispute but that more than one resolution is possible of the claim. The district court's findings of fact as to the Executive Order claim were and are fully in dispute on appeal. The Court of Appeals admitted that there was evidence in support of the Tribes' position when it noted that "[t]he record does reveal some evidence suggesting an intent on the part of the government to provide off-reservation fishing for the Shoalwater Indians." 96 F.3d at 343, Appendix A-24. The Court of Appeals went on to make its own findings as to the Shoalwater Bay Indian Reservation showing that there was an evidence of an intent to provide off-reservation fishing – evidence which was not considered by the district court in its findings of fact. *Ibid.*

It is true that, after noting this new evidence, the Ninth Circuit went on to apply the clearly erroneous test and hold that it was not "'left with the definite and firm conviction' that the district court made a mistake in its

findings." 96 F.3d at 343 (citation omitted). But when, as here, there have not been findings of fact based upon the correct legal standards as to whether there was an implied reservation of a right to fish off-reservation, a remand is appropriate " . . . [w]here the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury." *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *see also, Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 857 n.19 (1982).

This case presents an even more compelling case than *Pullman-Standard*. Unlike when there has been a reversal, both Tribes here have been denied an opportunity to present the evidence to the trier of fact untainted by erroneous conclusions of law. Unless this Court grants the petition, the Tribes will be forever denied an opportunity to have their case presented to a trial court under the correct legal standards. They will be denied an opportunity to have a proceeding based upon proper legal standards to determine the scope and extent of their fishing rights determined under their Executive Orders.

Here there was, also as to the Shoalwater Bay Executive Order, only a mixed finding of fact and law that there was not an express intent by the Executive to reserve an off-reservation right and "no express or implied intent that a *treaty* right was being reserved . . . " Finding of Fact No. 78 (emphasis added), Appendix C-28.[10] Significantly,

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[10] Since the executive orders are not treaties, this part of the finding is therefore only relevant, if at all, to the two petitioners' argument under the Treaty of Olympia which is addressed in a separate set of findings.

the district court never reached the issue of whether the Executive impliedly intended to reserve an off-reservation right for Shoalwater Bay since, of course, Conclusion of Law No. 21 did not require this inquiry. Although the court of appeals noted that there was a finding that "[t]here was no executive intent or United States intent to create or reserve off-reservation rights . . . "[11] this finding was necessarily based upon the assumption under Conclusion of Law No. 21 that an express intent to reserve an off-reservation right was required.

The findings, which often did not distinguish as to the type of intent, thus did not undertake the type of inquiry required to determine an implied intent to reserve an off-reservation fishing right for either Tribe. Since, as the court of appeals noted, the "specific purposes of executive-order reservations were often unarticulated"[12] it is not surprising that the district court could not find the express intent it sought. Rather, the district court should have undertaken the inquiry stated by the court of appeals of "the circumstances surrounding their creation, and the history of the Indians for whom they were created." *Id.*[13] However, this inquiry

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[11] 96 F.3d at 343 (reference to finding of Fact No. 80); see also, the finding that there is no "evidence . . . that any Indians understood the 1866 Executive Order to be creating or reserving off-reservation rights." *Id.*

[12] 96 F.3d at 342; Appendix A-22 (citation omitted).

[13] As the Court noted, this inquiry is mandated by cases cited such as *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) which required that, when there was not a clear statement of intent, the court should try to determine for an Indian reservation such as here whether the Indians were dependent on fishing and if so, what fisheries resources did

was not done by the district court. To apply the new standard on appeal to the existing findings is tantamount to the court of appeals making new findings of fact concerning implied intent which it lacks the power to do. *Pullman-Standard, supra.*

B. Review Should Also Be Granted On The Executive Order Issue Because The Court Of Appeals Incorrectly Held That A Mixed Question Of Law And Fact Can Only Be Reviewed Under The Clearly Erroneous Standard.

Nor is it correct to argue that the existing findings of fact can be relied upon as historical findings only reviewable under the deferential clear error standard. Appendix A-25; 96 F.3d at 343. Mixed questions of fact and law are reviewed de novo. *Ornelas v. United States*, 64 U.S.L.W. 4373, 4375 (May 28, 1996); *see also, Thornburg v. Gingles*, 478 U.S. 30, 79 (1984); Wright and Miller, supra, Vol. 9A at p. 608.

In addition to the underlying conclusion of law being incorrect, the ultimate findings of fact which the Court quoted were not strictly factual but rather were conclusions as to the primary issues in the case. Appendix A-24; 96 F.3d at 343.[14] As such, they are mixed questions of fact

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they use for their livelihood at the time of the reservation's creation?

[14] The State conceded in the Ninth Circuit that the interpretation of Executive Orders "presents both issues of law and issues of mixed fact and law." (State's Opening Br. Before the Ninth Circuit Court of Appeals at 8). The State agreed before the circuit court that not only conclusions of law but also "application of law to findings of historic fact" are reviewed de novo. State's Br. at 8-9.

and law which are reviewed de novo where application of law to fact requires consideration of legal principles. *Pullman-Standard, supra,* 456 U.S. at 286 discussing *Baumgartner v. United States,* 322 U.S. 665, 671 (1944). The need to grant review is all the more compelling given that the Ninth Circuit applied the de novo standard of review when, in another part of its opinion, it discussed the State's appeal of the Chehalis boundary issue on one of these same executive orders. Appendix A-25; 96 F.3d at 343. "We review de novo the court's interpretation of these executive orders." *Id.* (citations omitted). This is remarkable given that only one paragraph earlier the court of appeals had applied the clearly erroneous standard to reviewing both Tribes' own appeals of the district court's interpretation of the executive orders and the reservation of an off-reservation fishing right.

Given the clear inconsistency even in the same opinion, this Court should grant the petition so as to order a remand for a review based upon the de novo standard.

C. The Court Should Grant Review Of The Affiliation Claims Under The Treaty Of Olympia And Reverse The Ninth Circuit So As To Correct A Clear Conflict With An Opinion Of This Court.

The petitioners herein have been determined to be Affiliated Tribes under the Treaty of Olympia. *Halbert v. United States,* 283 U.S. 753, 758 and n.6 (1931). The Treaty provided a provision under which non-signatory tribes would be affiliated and have treaty rights. *Halbert,* 283 U.S. at 757. The Ninth Circuit's Opinion, however, departed from 60 years of precedent as announced in *Halbert* and subsequent cases concerning affiliation under

the Treaty of Olympia. The writ should be granted in order to consider the error of the court of appeals' disposition of this claim and the conflict with prior Supreme Court and Ninth Circuit case law.

The Ninth Circuit, in its opinion interpreting and, in effect, ignoring *Halbert, supra,* also departed from the concept that the right to fish at usual and accustomed grounds and stations is a tribal right. *Passenger Fishing Vessel, supra; United States v. Washington,* 520 F.2d 676, 688 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976). The Supreme Court should rectify this departure from the established interpretation of the Treaty of Olympia. The Ninth Circuit decision fails to distinguish between the nature of a tribal right and who may exercise that right. While, in *Halbert,* only individuals received allotments, those allotments could only have been granted to them because (i) they were members of a specific tribe and (ii) the tribe in question had rights as an affiliated tribe under the Treaty of Olympia. An affiliated tribe could not receive an allotment, as allotments on the Quinault Reservation were given to individuals. However, an individual, without the condition precedent of membership in a particular affiliated tribe, could not have received an allotment. Thus, under the circumstances of *Halbert,* only individuals who were members of affiliated tribes such as the Chehalis and Shoalwater Bay Tribes here could receive allotments.

This tribal/individual distinction is all the more clear from the language of *Halbert,* 283 U.S. at 760-761, which determined that tribal members of affiliated tribes did not have to leave their own reservations and take up residence on the Quinault reservation in order to obtain the right of allotment granted to the Chehalis and Shoalwater Bay Tribes under the Treaty of Olympia. Moreover,

Halbert did not require any such individuals to join, nor did it seek to have their respective affiliated tribes merge into Quinault in order to receive the allotment benefits of the Treaty of Olympia. 283 U.S. at 762.

The Ninth Circuit's requirement that the petitioners merge with the Quinault in order to exercise fishing rights under the Treaty of Olympia is also at odds with the decision in *Northern Arapaho Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987). Contrary to the Ninth Circuit formulation, the Tenth Circuit has recognized fishing rights of more than one tribe in the same reservation, even when only one of the tribes was a treaty signatory. That court recognized that both the Northern Arapaho and Shoshone Tribes, as separate, independent tribes, had coequal rights to hunt and fish on the Wind River Reservation. *Hodel, supra*, at 748.

This analysis was also supported by the Ninth Circuit's own prior analysis in *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir. 1981). The holding in that case is contrary to the current decision's holding that an affiliated tribe must merge or consolidate with Quinault in order to exercise fishing rights under the Treaty of Olympia. If, under *Halbert, supra*, merger or consolidation were required for affiliation, then, in *Wahkiakum, supra*, in order to reach an analysis which determined that the Wahkiakum Band's fishing rights could only be exercised at Quinault usual and accustomed locations, the *Wahkiakum* court would have had to address the merger issue as a condition precedent to its ultimate determination. No such review occurred, nor was such a review mandated as part of the test established by *Wahkiakum*.

The Ninth Circuit has attempted to change the meaning of affiliation as contained in *Halbert, supra*. Affiliation is not a means of transferring the rights belonging to the Quinault Nation to another tribe. It is, and since *Halbert, supra*, has consistently been held to be the means by which the treaty rights separately reserved for "other fish eating tribes", including the petitioners here, could be secured to those tribes under the Treaty of Olympia. 283 U.S. at 757-758.

D. The Ninth Circuit's Opinion On The Aboriginal Fishing Rights Claim Is Inconsistent With Rulings Of This Court That Aboriginal Fishing Rights Are Not Extinguished When There Has Been A Reservation Of Those Rights And A Lack Of Payment.

The Ninth Circuit decision relied upon *Western Shoshone National Council v. Molini*, 951 F.2d 200 (9th Cir. 1991) which in turn addressed the issue of whether the extinguishment of aboriginal title with respect to an Indian tribe included the extinguishment of that tribe's aboriginal fishing rights. The *Molini* court, relying upon *Oregon Department of Fish v. Klamath Indian Tribe*, 473 U.S. 765 (1985), found affirmatively that such an extinguishment included aboriginal fishing rights absent a reservation of those rights. However, this Court in *United States v. Dann*, 470 U.S. 39 (1985) and *Oregon Department of Fish*, has determined that an extinguishment of aboriginal fishing rights only occurs if (i) there has been payment for the right as in *Dann*, and (ii) there has been no intent to exclude a tribe's aboriginal fishing rights from extinguishment.

The Ninth Circuit departed from the analysis in *Dann* and *Oregon Department of Fish, supra.* The instant case, therefore, provides the opportunity to review the issue of whether a settlement between the United States and a tribe before the Indian Claims Commission, excluding compensation for aboriginal fishing rights and reserving those rights, is included within a limited exception as set forth in *Dann* and *Oregon Department of Fish.*

In *Chehalis v. United States,* 12 Ind. Cl. Comm. 644 (1963), the United States contractually agreed that the extinguishment of aboriginal title in that case did not extinguish the petitioners' aboriginal Chehalis fishing rights. The Commission held that "[t]he evidence shows that the settlement is not intended to disturb the existing reservation rights or hunting and fishing rights of the Chehalis Indians." 12 Ind. Cl. Comm. 658. However, the Ninth Circuit, when reviewing the aboriginal claim did not focus on the above language and determined that the contractual agreement in the settlement did not rise to the level required by *Molini* because they appeared to have found that a 20th Century expression of a 19th Century action was insufficient to effectuate the exception. The Ninth Circuit reached this conclusion by reformulating the settlement language to find that the Commission found "only that the settlement had no effect on existing fishing rights, *if any.*" (emphasis added). 96 F.3d at 342.

This Court should grant the writ in order to establish guidelines under *Dann* and *Oregon Department of Fish* for determining the appropriate parameters of an intent to reserve aboriginal fishing rights in the context of a settlement between the United States and a tribe before the Indian Claims Commission.

First, the Ninth Circuit reformulation of the *Dann* and *Oregon Department of Fish* exception is contrary to established rules of construction concerning the interpretation of ambiguous actions or wording with respect to Indian tribes. Executive Orders, treaties and statutes must be liberally construed "in favor of establishing Indian rights." F. Cohen, *Federal Indian Law* (1982) at 224; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985); *Arizona v. California*, 373 U.S. 546, 599-600 (1963). This Court has repeatedly held that ambiguities must be resolved in favor of tribes. *Montana, supra; see also, Oregon Department of Fish*, at 765-766 which specifically addressed and approved these concepts in the exact context before this Court. The Ninth Circuit here, however, abandoned that principle in order to reach the conclusion which the petitioners seek to overturn.

Second, the Ninth Circuit formulation with respect to the payment and statements in the Indian Claims Commission Findings ignores that those Findings represented the United States' express statement of its own intent when aboriginal title was extinguished. The court of appeals, in effect, ignored the clear expression of United States' intent in order to reach the result from which petitioners appeal.

The United States' promise to petitioners was an important inducement to accept the settlement before the Claims Commission. The Ninth Circuit was wrong when it ignored *Dann* and *Oregon Department of Fish* and held that the settlement was meaningless and of no legal consequence. This Court should require that, under the

narrow exception in *Dann* and *Oregon Department of Fish*, the United States' word is binding.

CONCLUSION

For the reasons stated herein the Tribes respectfully requests that the Court grant their petition.

DATED this 18 day of February 1997.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES OF CHEHALIS INDIAN RESERVATION,

Plaintiff-Appellant, Cross-Appellee,

and

SHOALWATER BAY INDIAN TRIBE,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON; WILLIAM R. WILKERSON, individually and as Acting Director of the State of Washington Department of Fisheries; FRANK R. LOCKARD, individually and as Director of the State of Washington Department of Game; WASHINGTON STATE GAME COMMISSION,

Defendants-Appellees,

and

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF WASHINGTON,

Defendant-Appellee, Cross-Appellant.

Nos. 95-35370
95-35371

D.C. Nos.
CV-83-00117-BJR
CV-70-9213-BJR

OPINION

Appeals from the United States District Court for the District of Western Washington, Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted
August 6, 1996 – Seattle, Washington

Filed September 6, 1996

Before Eugene A. Wright, Robert R. Beezer and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Wright

SUMMARY

Natural Resources & Energy/Native American Rights

The court of appeals affirmed judgments of the district court. The court held that an executive order opening an Indian reservation to public use, in order to allow homesteading by tribe members, does not diminish the size of the reservation specified by the treaty that created it.

A reservation in Southwest Washington created by secretarial order in 1864 is occupied by descendants of the Upper and Lower Chehalis, Cowlitz, and other Indian tribes. Appellant Shoalwater Bay Indian Tribe occupies a reservation on the Washington Coast that was created by executive order in 1866.

In 1855, the Governor of Washington proposed the Treaty of Olympia, which would have removed Chehalis, Chinook and Cowlitz Indians to a reservation in Quinault Indian territory and guaranteed signatory tribes fishing

rights "at all usual and accustomed grounds and stations." The Quinaults signed the treaty and the senate ratified it in 1859. Neither the Shoalwaters nor the Upper Chehalis signed, and no treaty was concluded with the Chehalis, Chinook, or Cowlitz Tribes.

In 1866, President Johnson signed an order establishing the Shoalwater Bay Reservation. An 1873 executive order expanded the Quinault Reservation. Under a 1911 federal statute, the Department of Interior made allotments on it to members of the Quinault Tribe. In *Halbert v. United States*, 283 U.S. 753 (1931), the Supreme Court held that members of the Chehalis, Chinook and Cowlitz tribes affiliated with the Quinault were entitled to allotments on the Quinault Reservation under the statute and 1873 executive order.

In the late 1870s and early 1880s, Indian officials sought allotments for residents of the Chehalis Reservation because the executive order creating it did not provide for allotment. They proposed that the reservation land be restored to the public domain so that the Chehalis Indians could immediately obtain homesteads on the reservation. President Cleveland issued an executive order in 1886 restoring the land to the public domain and setting apart 471 acres for Indian use. Two subsequent executive orders restored parts of this parcel to provide additional homesteads for the Chehalis.

In separate actions to determine their rights to fish both on and off reservation, appellants Confederated Tribes of Chehalis Indian Reservation and the Shoalwater Bay Indian Tribe sued appellees State of Washington and the United States. The district court consolidated the

actions, identifying two issues for resolution: (1) what rights the Tribes had to fish free of state regulation in the relevant waters; and (2) how to allocate their catch. To determine the Chehalis Tribe's on-reservation fishing rights, the court also addressed the issue of the current boundaries of the Chehalis reservation.

The district court determined that the reservation retained the same boundaries described in the 1864 order creating it, and had not been diminished by the subsequent executive orders. The court also ruled that the Tribes did not have rights to fish at the usual and accustomed grounds of the Quinault Tribe under the Treaty of Olympia and the 1873 executive order, finding that the United States had no intent to create or reserve off-reservation fishing rights by implication. Additionally, the court determined that an 1863 executive order opening lands in Southwest Washington for settlement by non-Indians was inconsistent with exclusive use and occupancy of any of the local tribes and extinguished any remaining aboriginal title in the region.

On appeal, the Tribes contended that the district court erred in concluding that they did not have a right to fish at the usual and accustomed fishing grounds of the Quinault Tribe under the Treaty of Olympia and the 1873 executive order. They also asserted that a settlement provision of a 1963 Indian Claims Commission award reserving Chehalis fishing rights supported their aboriginal title. The State contended that the district court erred in concluding that the Chehalis Reservation retained the boundaries set by the 1864 order creating it, and that it was not diminished by the subsequent exeuctive restoration orders.

[1] Treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights. Ambiguities must be resolved in favor of the Indians. [2] However, the rules of construction were of no help to the Tribes in their claim to Quinault fishing rights because of the countervailing interests of the Quinaults.

[3] A treaty signatory tribe may obtain treaty fishign rights of another signatory tribe only if the tribes merge or consolidate in a manner sufficient to combine their tribal or political structures. The Tribes never signed the Treaty of Olympia or any other treaty. They also never merged or consolidated with any of the tribes that signed the Treaty. [4] *Halbert* does not support the conclusion that the Tribes themselves were entitled to Quinault fishing rights. It was concerned only with allotment and addressed the rights of *individual* Indians, not tribal rights.

[5] Dicta in *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir. 1981) added that members of a tribe subsequently affiliated with the Quinault are entitled to share in the rights granted to the original signatories by the treaty. [6] This appeared to support the Tribes' claim that affiliated *tribes* have the right to fish at Quinault grounds. But when specifying this right, the passage refers only to individual *members* who obtain allotments on the Quinault Reservation. For this reason and because the passage is dictum, it did not compel the conclusion that the Tribes were entitled to Quinault fishing rights.

[7] The Tribes were not entitled to Quinault fishing rights. They have not merged or consolidated with the

Quinault in a manner sufficient to combine their tribal or political structures. "Affiliation" is a term derived from the 1911 Allotment Act, which dealt with *individual* Indians. It does not equate with "consolidation" as a means of conferring *tribal* rights.

[8] Aboriginal title refers to the right of the original inhabitants of the United States to use and occupy their aboriginal territory. It exists at the pleasure of the United States and may be extinguished by treaty or otherwise. Extinguishment terminates corresponding use and occupancy rights, including fishing rights, except when such rights are reserved in a treaty, statute, or executive order.

[9] The settlement provision of the 1963 Indian Claims Commission award did not reserve aboriginal fishing rights, but said only that the settlement had no effect on existing fishing rights, if any. There were no such rights because they had been extinguished with aboriginal title.

[10] Executive orders are interpreted as the Indians would have understood them, and any doubtful expressions should be resolved in the Indians' favor. [11] The district court's findings showed that it conducted the required inquiry and found that there was no intent by the United States to create or reserve an off-reservation fishing right by implication. [12] The court did not err in rejecting the claim that the executive order creating the Chehalis Reservation contained an implied off-reservation fishing right.

[13] Once a reservation is established, there is a strong presumption that it remains intact. A reservation is diminished only if there is substantial and compelling

evidence of an intent on the part of the government to diminish.

[14] The 1886 executive order restored the Chehalis Reservation to the public domain and provided that 471 acres would be set apart for the use and occupation of the Chehalis Indians. [15] On its face, it seemed to diminish the size of the reservation. [16] However, the circumstances surrounding the order showed that there was no executive intent to diminish the reservation. [17] The restoration of lands to the public domain was merely an expedient means of granting the Chehalis allotments in the form of homesteads. [18] Subsequent treatment of the land did not provide substantial and compelling evidence of an intent to diminish.

COUNSEL

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OPINION

WRIGHT, Circuit Judge:

This case involves claims by two Indian tribes in Southwest Washington to off-reservation fishing rights. The Shoalwater Bay Tribe and the Confederated Tribes of the Chehalis Indian Reservation have no such rights by treaty, but they assert that they have implied fishing rights arising from the executive orders creating their reservations. They also argue that they are entitled to the treaty fishing rights of the Quinault Tribe. Finally, they argue that they have extant fishing rights based on Chehalis aboriginal title. Allied against the Tribes on appeal are the United States, the State of Washington and the Quinault Tribe.

In its findings of fact and conclusions of law, the district court concluded that the Tribes' claims were not well-founded. We agree and affirm the judgment of the court. We also affirm the court's judgment on the question of the boundaries of the Chehalis Reservation.

BACKGROUND

A. Introduction

The Confederated Tribes of the Chehalis Indian Reservation ("Chehalis Tribe") occupy a reservation at the confluence of the Black and Chehalis Rivers in Southwest Washington. This reservation was created by secretarial order in 1864. Tribal membership includes persons descended from the Upper Chehalis Indians, and may also include descendants of the Lower Chehalis, Cowlitz

and other tribes of Southwest Washington. The Shoalwater Bay Indian Tribe occupies a reservation on the north side of Willapa Bay (formerly Shoalwater Bay) on the Washington coast. The members are descendants of a small group of Indians of Chinook and Lower Chehalis ancestry who settled on the reservation, which was created by executive order in 1866.

B. Historical Background

1. Tribal Pre-Treaty History

The Chinook, Chehalis and Cowlitz Indians lived in Southwest Washington for centuries before the arrival of white settlers. They were considered "fish-eating" Indians; that is, their livelihood depended on fish and seafood. *Halbert v. United States*, 283 U.S. 753, 757 (1931). The Upper Chehalis Indians were primarily river fishermen, with principal fisheries in the Chehalis River drainage system. The Lower Chinook and Lower Chehalis fished both in marine waters and in rivers and streams near the coast.

2. The Dart Treaties

By the 1850's, settlers had begun to encroach upon tribal lands. In 1851, Dr. Anson Dart, representing the United States, negotiated a series of treaties with the Chinook and other bands of Indians in the region to provide a reservation at Shoalwater Bay. His treaties contemplated fishing rights on the rivers emptying into the Bay. They were never ratified, however, and no lands or rights were reserved as a result of Dart's efforts.

3. The Chehalis River Council and Treaty of Olympia

In 1855, Governor Stevens of Washington Territory held a treaty council at the Chehalis River. Members of many bands of local Indians, including Chehalis, Chinook and Cowlitz Indians, attended. Stevens proposed a treaty whereby all tribes of the region would be removed to a reservation in Quinault Indian territory. Article III of the treaty guaranteed signing tribes "the right of taking fish at all usual and accustomed grounds and stations." Article VI allowed the President to consolidate the signing tribes with other "friendly tribes and bands." *See Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176, 179 n.6 (9th Cir. 1981).

The Indians living at Shoalwater Bay refused to sign because they wanted a separate reservation at the bay and objected to being relocated to unfamiliar Quinault territory. Similarly, representatives of the Upper Chehalis refused to sign because they wanted to stay on the Chehalis River and preferred a reservation there. The Quinault Tribe did sign, perhaps because the treaty guaranteed them a reservation where they were already living. The neighboring Quileute, Queets and Hoh Tribes eventually signed as well, and the Senate ratified the treaty in 1859. It is known both as the Treaty of Olympia and the Treaty with the Quinault.

Governor Stevens intended to renew treaty negotiations with the non-signing tribes, but his attention was diverted by other events, including the Civil War and the outbreak of an Indian war. No treaty was ever concluded with the Chehalis, Chinook or Cowlitz Tribes.

4. Orders Creating the Chehalis and Shoalwater Reservations

The flood of settlers into the region continued. In response, the government sought to set aside reservations for the Chehalis, Chinook and Cowlitz Indians at the locations requested at the Chehalis River Council. In 1860, Michael Simmons, a member of Stevens' treaty commission, wrote to the Superintendent of Indian Affairs for the Washington and Oregon Territory that:

> The Upper and Lower Chehalis, the Cowlitz and Chinook Indians, numbering between seven and eight hundred, are not parties to the existing treaties, and are certainly entitled to the care of the government. They are in the immediate neighborhood of the settlements, living in most instances on the land of white settlers. I have selected a piece of ground adapted to their wants, and upon which I think it will be advisable to settle the Cowlitz and Upper Chehalis tribes. The Chinooks and Lower Chehalis should be located somewhere near the seashore, as their previous habits and mode of living render such a location necessary.

Letter from Simmons to Superintendent Geary, July 1, 1860.

Further discussions among government officials culminated in the establishment in 1864 of the Chehalis Reservation by order of the Secretary of the Interior. Two years later, President Johnson entered an order establishing the Shoalwater Bay Reservation. That order, written by hand on a map of the proposed reservation, reads:

> Let the tract of land as indicated on the within diagram be reserved from sale and set apart for Indian purposes, as recommended by the Secretary of the Interior in his letter of the 18th instant, said tract embracing portions of sections 2 and 3 in township 14 north, range 11 west, Washington Territory.

5. Expansion and Allotment of the Quinault Reservation

In 1871, only Quinault Indians lived on the Quinault Reservation. Despite the provision of the Treaty of Olympia requiring the Quileute, Queets and Hoh to move to the reservation, these tribes remained at their traditional homes on the coast to the north. In 1872, Superintendent Milroy proposed that the reservation be enlarged so that these tribes, along with other Indians of the region, could be collected on the enlarged reservation. An executive order of 1873 enlarged the reservation:

> In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory . . . be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific coast. . . .

I Charles Kappler, *Indian Affairs: Laws and Treaties* 923 (1904).[1]

In 1911, Congress directed the Secretary of Interior to make allotments on the Quinault Reservation under the provisions of the allotment laws to "all members of the Hoh, Quileute, Ozette or other tribes of Indians of Washington who are affiliated with the Quinaielt and Quileute tribes in the [Treaty of Olympia] and who may elect to take allotments on the Quinault Reservation rather than on the reservations set aside for these tribes." The Supreme Court subsequently ruled that members of the Chehalis, Chinook and Cowlitz tribes were entitled to allotments on the Quinault reservation pursuant to this act and the 1873 executive order. *Halbert*, 283 U.S. at 758.

6. Order Opening up Chehalis Reservation for Homesteading

In the late 1870's and early 1880's, local Indian officials sought to provide allotments for Indians living on the Chehalis Reservation. Because the executive order establishing the reservation contained no legal authority for allotment, the officials proposed that the Chehalis reservation land be restored to the public domain so that the Chehalis Indians could immediately obtain homesteads on the reservation under the homestead laws. This was done by executive order in 1886. The order opened

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[1] Quinaielt, Quillehute and Quit are variant spellings of Quinault, Quileute and Queets, respectively.

up all but 471 acres of the reservation, which were withdrawn from sale and "set apart for the use and occupation of the Chehalis Indians." Two similar executive orders in 1908 and 1909 restored parts of this 471-acre parcel to provide additional homesteads for members of the tribe.

C. Proceedings in District Court

The Tribes sued in district court for a determination of their rights to fish both on and off reservation. The district court consolidated the cases for the resolution of two issues: (1) what rights, if any, the Tribes have to fish free of state regulation in the Chehalis River system, the Grays Harbor systems, Willapa Bay, the rivers and streams emptying into Willapa Bay and waters adjacent to the Bay; and (2) how to allocate the catch of these two tribes. To determine the Chehalis Tribe's on-reservation fishing rights, the district court also addressed the issue of the current boundaries of the Chehalis Reservation.

The Tribes argued at trial before a magistrate judge that they had a right under the Treaty of Olympia to fish at Quinault usual and accustomed fishing grounds. They also argued that they had unextinguished aboriginal rights to fish, free from state regulation, at their usual and accustomed fishing grounds off the reservations. Finally, they argued that they had off-reservation fishing rights arising from the orders creating their reservations.

The district court adopted the magistrate judge's findings of fact and conclusions of law rejecting these claims. The court, however, did not adopt the judge's separate findings on the issue of the boundaries of the

Chehalis reservation. It found that the reservation retained the same boundaries described in the 1864 order creating it, and had not been diminished by the 1886, 1908 and 1909 executive orders restoring reservation lands to the public domain.

ANALYSIS

A. Rights to Take Fish at Quinault Usual and Accustomed Places

The Tribes argue that the district court erred in concluding that they do not have a right to fish at the usual and accustomed fishing grounds of the Quinault Tribe pursuant to the Treaty of Olympia and the 1873 executive order. We review de novo the district court's interpretation of treaties, statutes and executive orders. *See United States v. State of Washington*, 969 F.2d 752, 754-55 (9th Cir. 1992), *cert. denied, Lummi Indian Tribe v. Washington*, 507 U.S. 1051 (1993).

1. Indian Canons of Construction

[1] Courts have uniformly held that treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985); *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2546 (1996). Any ambiguities in construction must be resolved in favor of the Indians. *Parravano*, 70 F.3d at 544. These rules of construction "are rooted in the unique trust relationship between the United States and the

Indians." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

[2] The rules of construction, however, are of no help to the Tribes in their claim to Quinault fishing rights because of the countervailing interests of the Quinaults. The government owes the same trust duty to all tribes, including the Quinault. *See Nance v. EPA*, 645 F.2d 701, 711 (9th Cir.) (government has same fiduciary relationship with the Northern Cheyenne Tribe as it does with the Crow Tribe), *cert. denied, Crow Tribe of Indians v. EPA*, 454 U.S. 1081 (1981). We cannot apply the canons of construction for the benefit of the Tribes if such application would adversely affect Quinault interests. *See Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986) ("No trust relation exists which can be discharged to the plaintiff here at the expense of other Indians.").

2. "Affiliation" with the Quinault Tribe

[3] In *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 (9th Cir. 1990), we held that a treaty signatory tribe may obtain the treaty fishing rights of another treaty signatory tribe only if the tribes merge or consolidate in a manner sufficient to combine their tribal or political structures. The Tribes concede that they never signed the Treaty of Olympia or any other treaty. They also concede that they have never merged or consolidated with any of the tribes that signed the Treaty.

They argue nonetheless that they are entitled to Quinault fishing rights through the interplay of the Treaty of Olympia and the 1873 executive order enlarging

the Quinault Reservation. Article VI of the Treaty allowed the President to consolidate the treaty signatories with other "friendly tribes and bands." The 1873 executive order, in turn, expanded the Quinault Reservation for the use of "other tribes of fish-eating Indians on the Pacific coast." The Tribes contend that, through these provisions, they became "affiliated" with the treaty tribes for the purposes of obtaining Quinault fishing rights. They argue that the Supreme Court's decision in *Halbert*, 283 U.S. 753, commands this conclusion.

In *Halbert*, the Court held that Indians of the Chehalis, Chinook and Cowlitz Tribes were entitled to allotments on the Quinault Reservation pursuant to the 1911 Quinault Allotment Act, which allowed allotments "to all members of the Hoh, Quileute, Ozette or *other tribes of Indians* in Washington who are *affiliated* with the Quinaielt and Quileute Tribes in the [Treaty of Olympia]." 283 U.S. at 758 (emphasis added). The Court reasoned that these Indians were "affiliated" with the treaty tribes through the consolidation provision of the Treaty and through the 1873 executive order. *Id.* at 759. It noted that the Treaty secured to them "the right of taking fish at all usual and accustomed grounds." *Id.* at 760.

[4] *Halbert* does not support the conclusion that the Tribes themselves are entitled to Quinault fishing rights. That case was concerned only with allotment and addressed the rights of individual Indians, not tribal rights. *See Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991) (*Halbert* involved "only the adjudication of individual member's rights").

[5] The Tribes respond that this court's decision in *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir. 1981), also commands the conclusion that they are entitled to Quinault fishing rights through affiliation. There, the court rejected the Wahkiakums' claim to fishing rights at its own traditional fishing grounds under the Treaty of Olympia. In dictum, the court added that the Wahkiakums did have some rights to fish at the grounds of the treaty signatory tribes:

> As members of a tribe subsequently affiliated with the Quinault under the treaty, they are, however, entitled to share such rights as are granted to the original signatories by the treaty. The members of the Wahkiakum, a tribe of fish-eating Indians of the locality, have the opportunity to take an allotment on the Quinault Reservation and to exercise the fishing rights which accompany that allotment. Those fishing rights are secured by Article III [of the Treaty of Olympia] which protects the rights of the Quinault and *any affiliated tribe* to fish at all usual and accustomed Quinault fishing grounds.

Id. at 179-80 (emphasis added).

[6] This passage appears to support the Tribes' claim that affiliated *tribes* have a right to fish at Quinault grounds. But when specifying this right, the passage refers only to individual *members* of such tribes who obtain allotments on the Quinault Reservation. For this reason and because the passage is dictum, it does not compel a conclusion that the Tribes are entitled to Quinault fishing rights.

[7] We conclude that the Tribes are not entitled to Quinault fishing rights. They have not merged or consolidated with the Quinault "in a manner sufficient to combine their tribal or political structures," as required by *Suquamish Indian Tribe*, 901 F.2d at 775-76. Although they may have "affiliated" with the Quinault, "affiliation" is a term derived from the 1911 Allotment Act, which dealt with *individual* Indians. We do not equate it with "consolidation" as a means of conferring *tribal* rights.

The district court did not err in rejecting the Tribes' claim to Quinault fishing rights.

B. Aboriginal Fishing Rights

The Tribes argue that the district court erred in finding that the Chehalis Tribe does not have a right, based on aboriginal title, to fish at Chehalis usual and accustomed fishing grounds. We review for clear error the factual question whether a tribe still retains such rights. *See Wahkiakum*, 655 F.2d at 180 n.12 ("Whether or not an aboriginal right exists would be a question of fact to establish continuous exercise of the right since before pre-treaty times.").

[8] Aboriginal title refers to the right of the original inhabitants of the United States to use and occupy their aboriginal territory. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). It exists at the pleasure of the United States, and may be extinguished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise. . . ." *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347 (1941). Extinguishment terminates corresponding use and

occupancy rights, including fishing rights, except where such rights are expressly or impliedly reserved in a treaty, statute or executive order. *See Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 202-03 (9th Cir. 1991) (tribe's aboriginal hunting and fishing rights taken when full title extinguishment occurred absent express reservation of those rights), *cert. denied*, 506 U.S. 822 (1992); *see also Wahkiakum*, 655 F.2d at 180 n.12 ("An aboriginal right to fish has been recognized only in the context of interpretation of a ratified treaty or federal statute, where courts have held that aboriginal fishing rights were impliedly reserved to the Indians.").

The district court found that an 1863 executive order opening lands in Southwest Washington for settlement by non-Indians was inconsistent with exclusive use and occupancy of any of the local tribes and therefore extinguished any remaining aboriginal title in the region. The court also found that all aboriginal fishing rights of Indians to which the Tribes claim successorship were extinguished with aboriginal title.

[9] The Tribes do not directly confront these factual findings. Instead, they argue that a settlement provision contained in a 1963 Indian Claims Commission award "expressly reserved [Chehalis] aboriginal hunting and fishing rights." *See Upper Chehalis Tribe v. United States*, 12 Ind. Cl. Comm. 644, 648 (1963). This argument is without merit. The provision stated only that the settlement, which resolved that all Chehalis aboriginal tribal lands had been taken, "in no way or manner releases . . . any hunting and fishing rights of the Chehalis Indians. . . ." *Id.* The provision did not reserve aboriginal fishing rights, but said only that the settlement had no effect on

existing fishing rights, if any. But as the district court found, there were no such rights because they had been extinguished with aboriginal title. We reject the Tribes' claim to Chehalis aboriginal fishing rights.

C. Fishing Rights Arising from Orders Creating the Reservations

The Tribes argue that the district court erred in concluding that the orders creating the Shoalwater and Chehalis Reservations did not impliedly reserve off-reservation fishing rights. Although we review de novo the court's interpretation of executive orders, we review questions of historical fact for clear error. *United States v. Lummi Indian Tribe*, 841 F.2d 317, 319 (9th Cir. 1988).

[10] The court based its conclusion partly on the legal ground that off-reservation fishing rights must be expressly reserved. It relied on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), which says that, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49. The question here, however, is whether the executive orders, issued before Washington became a state, contained implied off-reservation fishing rights.[2] In considering this question, we

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[2] Because the reservations were created before Washington became a state, the general rule of *Mescalero* has little bearing on the question whether implied rights arise from the executive orders creating these reservations. *See Moore v. United States*, 157 F.2d 760, 764 (9th Cir. 1946) (implied rights arising from

must keep in mind that the specific purposes of executive-order reservations were often unarticulated. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981). To identify these purposes, and the rights associated with them, we must consider the executive orders themselves, the circumstances surrounding their creation, and the history of the Indians for whom they were created. *Id.* As with treaties, executive orders are interpreted as the Indians would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor. *Parravano*, 70 F.3d at 544.

[11] Although the district court may have based its rejection of the Tribes' rights on an incomplete review of the law applicable to executive order reservations, it also based its rejection on separate and independent findings of historical fact. These findings show that the court conducted the inquiry required in *Colville Confederated Tribes*. With respect to the Chehalis Reservation, the court found that "there was no United States intent to create or reserve any off-reservation fishing right by implication." It found also that:

> The Executive Order reserving lands for the Chehalis Indians was not conditional or based upon agreement with the Indians. The Upper Chehalis Indians at that location did not believe or understand that they were obtaining a treaty or treaty rights, nor did they believe they were

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executive order creating the Quileute Reservation take precedence over express rights granted to subsequently created state), *cert. denied*, 330 U.S. 827 (1947).

> obtaining any off-reservation fishing right from the United States.

The record supports these findings. A letter from Commissioner of Indian Affairs Dole, proposing the Chehalis Reservation, described the Indians' desire to "abandon their roving life" and "cultivate their lands." I Charles Kappler, *Laws and Treaties*, 901-02 (1904). The letter intimated that the purpose of the reservation was to provide farmlands for the Indians, and made no mention of fishing rights at traditional grounds off the reservation.

Similarly, Sidney Ford, Indian Agent for the Chehalis and Coast District, reported in 1856 that the Upper and Lower Chehalis Indians "seem desirous of living more like the whites, of cultivating lands and raising stock." He added that:

> A locality can be selected where there is an abundance of good farming lands, plenty of timber, and natural meadows more than sufficient to supply all their Stock for years to come. The Chehalis River traverses their country from East to West affording not only fine fishing grounds, but also with its numerous springs and branches, an ample supply of water for all farming purposes. . . .

Letter from Ford to Simmons, October 10, 1856. This letter suggests that the primary intent for creating the Chehalis Reservation was to provide farming lands for the Indians. It also suggests that the Indians could fulfill their fishing needs at the fishing grounds contained in the reservation.

[12] We conclude that the court did not err in rejecting the claim that the executive order creating the

Chehalis Reservation contained an implied off-reservation fishing right.

As for the Shoalwater Reservation, the court found that:

> There was no executive intent or United States intent to create or reserve off-reservation fishing rights for any group of Indians or for the eventual occupants of the lands reserved on Shoalwater Bay. That the lands were proximate to fishing and other resources was a factor in selecting the location, but this does not amount to the creation of a special off-reservation fishing right.

It also found that:

> There is no evidence or indication that any Indians understood the 1866 Executive Order to be creating or reserving off-reservation rights associated with the Shoalwater Bay Reservation.

The record does reveal some evidence suggesting an intent on the part of the government to provide off-reservation fishing for the Shoalwater Indians. For example, the failed Dart treaties contemplated fishing rights for the Shoalwater Bay Indians at the rivers emptying into the Bay. And in 1854, Indian Agent W.H. Tappan wrote to Governor Stevens that "[the Indians] at Shoalwater Bay should have free access to the clam and oyster banks and to the fisheries of the Chehalis and Columbia rivers." Letter from Tappan to Stevens, Sept. 30, 1854. After treaty negotiations at the Chehalis River Council failed, Governor Stevens instructed Indian Agent Simmons to negotiate treaties with the remaining non-treaty

Indians in Southwest Washington, saying, "[t]he Chinooks, Shoalwater Bay and Lower Chehalis may be informed that their reservation will be selected so as to provide them with fishery and potatoe grounds." Letter from Stevens to Simmons, May 3, 1855.

We are not, however, "left with the definite and firm conviction" that the district court made a mistake in its findings. *Sawyer v. Whitley*, 505 U.S. 333, 346, n.14 (1992). Under the highly deferential clear error standard, we conclude that the court did not err in rejecting the Shoalwater Tribe's claim to implied off-reservation fishing rights.

D. Boundaries of the Chehalis Reservation

The state cross-appeals the district court's judgment that the Chehalis Reservation retains the boundaries set by the 1864 order creating the reservation, and that executive orders of 1886, 1908 and 1909 did not diminish the size of the reservation. We review de novo the court's interpretation of these executive orders. *See United States v. State of Washington*, 969 F.2d at 754-55.

[13] Once a reservation is established, there is a strong presumption that it remains intact. *See DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975). We do not lightly infer diminishment of reservations, and resolve any ambiguities concerning alleged diminishment in favor of the Indians. *Hagen v. Utah*, 114 S. Ct. 958, 965 (1994). We conclude that a reservation is diminished only if there is "substantial and compelling evidence" of an intent on the part of the government to diminish. *Solem v. Bartlett*, 465 U.S. 463, 472 (1984).

The most probative evidence of diminishment is the statutory language used to open the Indian lands. *Id.* at 470. Courts also consider the circumstances leading up to the passage of the law, and to a lesser extent, the events occurring after its passage. *Id.* at 471. Information concerning persons who actually moved onto the opened reservation lands and the subsequent demographic history of the opened lands is also relevant. *Id.* at 471-72.

[14] The 1886 executive order opening up the Chehalis Reservation said: "It is hereby ordered that the following tract of country in Washington Territory, reserved for the use and occupation of the Chehalis Indians, by order of the Secretary of the Interior, dated July 8, 1864, be, and the same is hereby, restored to thc public domain:. . . . " I Charles Kappler, *Indian Affairs: Laws and Treaties* 903 (1904). The order also provided that approximately 471 acres "be, and the same is hereby, withdrawn from sale or other disposition, and set apart for the use and occupation of the Chehalis Indians." *Id.* at 904.

[15] On its face, the order appears to diminish the size of the reservation. *Cf. Hagen*, 114 S. Ct. at 966 (holding that congressional act restoring reservation land to the public domain evidenced a congressional intent to diminish); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 354 (1962) (holding that size of Colville Indian Reservation was diminished by a congressional act stating that about one-half of the original reservation should be "vacated and restored to the public domain.").

[16] The historical circumstances surrounding the order, however, show that there was no executive intent to diminish the reservation. In the years between the establishment of the Chehalis Reservation and the 1886 executive order, the government was in the process of allotting reservations. *See* F. Cohen, *Handbook of Federal Indian Law* 129-30 (1982 ed.). The Stevens Treaties routinely contained provisions authorizing the eventual allotment of reservations. *See, e.g., Wahkiakum*, 655 F.2d at 179 n.6 (quoting Article VI of Treaty of Olympia, which expressly granted President authority to allot Quinault Reservation). The secretarial order creating the Chehalis reservation, however, contained no authorization for allotment. This was a cause of frustration and concern for the local Indian officials. In 1878, Agent Milroy wrote to the Commission of Indian Affairs of the injustice of denying allotments to the Chehalis and Shoalwater Bay Indians. Referring to the Shoalwater, he said:

> It surely is not the policy or interest of the Government to continue these Indians in enforced communism, and deny them individual titles to homes on a reservation set appart [sic] to them by their Great Father the President out of a country that was once *legally* and *equitably* theirs and the title to which they have never parted with.

Letter from Milroy to Commissioner of Indian Affairs, Oct. 25, 1878 (emphasis in original).

Milroy urged the Commissioner "to try to discover some way by which legal titles may be granted to such Indians of said two non treaty Reservations, as have substantially complied with the requirements of our

homestead laws. . . . " *Id.* He added: "If there is a *will*, then surely can be found a *way* to do justice to these poor Indians." *Id.* (emphasis in original).

For years, however, no action was taken to secure individual property titles for the Chehalis Indians. In 1885, Indian Agent Edwin Eells finally proposed a solution to the problem: "I have suggested to the [Department of the Interior] that the executive order be so changed that the Indians residing thereon be allowed to take the lands they occupy under the Indian homestead laws. If this could be done they would then be secured in the quiet and peaceable possession of their homes." *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1885*, 193 (1885).

In 1886, the Commissioner of Indian Affairs recommended to the Secretary of the Interior that the government adopt Eells' proposal that the Chehalis lands "be restored to the public domain, and be then entered by the Indian occupants under the homestead laws." Letter from Commissioner Atkins to Secretary of the Interior, Sept. 25, 1886. The Commissioner explained:

> As soon as the lands are restored, the Indians can make their entries, and under the Land Office circular of May 31, 1884, *no other persons can enter the lands occupied by them.* The titles acquired under the homestead laws as amended by the act of July 4, 1884, (23 Stats.96) are inalienable for a period of twenty-five years.

Id. (emphasis added). He noted that the Indians were "anxious to receive titles for their lands, more especially as all the other Indians belonging to the Nisqually Agency" had received such title. *Id.* "This desire has

existed for some years, and is a natural one which ought to be granted if possible." *Id.*

The Commissioner included a draft of an executive order restoring the lands to the public domain and setting apart 471 acres for an Indian school. *Id.* President Cleveland signed the order in 1886.

[17] These documents reveal no "substantial and compelling evidence" of an intent on the part of the government to diminish the reservation. *Solem*, 465 U.S. at 472. Instead, they show an intent to provide the Chehalis with the same allotments that the treaty reservation Indians enjoyed. The restoration of lands to the public domain was merely an expedient means of granting them allotments in the form of homesteads.

[18] Similarly, our review of the subsequent treatment of the land does not provide "substantial and compelling evidence" of an intent to diminish. There is some evidence suggesting diminishment. For example, a 1964 letter from an Indian Agency Realty officer to the Superintendent of Indian Affairs said that "[t]he present Chehalis Reservation area consists of 346.7 acres, more or less." Letter from John Vaninetti to Superintendent of Indian Affairs Felshaw, March 16, 1964.

But other evidence suggests no diminishment. For example, a 1906 school superintendent's report described the reservation as maintaining its original boundaries:

> [It] is located near Oakville, Chehalis County, and these Indians are gradually improving their allotments and are generally prosperous. The low land is quite fertile and the higher land is used for winter grazing. The day school is well

> attended and has been quite successful. New roads have been built and old ones repaired, and we now have an excellent road thru the reservation to Oakville.

Reports Concerning Indians in Washington, p. 376 (1906).

Also, a 1952 agreement between the Chehalis Tribe and the Washington Department of Fisheries concerning regulation of fishing on the reservation recognized the existence of an on-reservation fishery within the original reservation boundaries. Agreement between the Chehalis Indian Tribal Council and the Wash. Dept. of Fisheries, Oct. 9, 1952.

As for the persons who actually moved onto the reservation, the executive order and related documents indicate that only the reservation Indians could take homesteads on the opened lands, and were to do so once the lands were restored to the public domain. *See* Letter from Commissioner Atkins to Secretary of the Interior, Sept. 25, 1886. Thus, initially the lands were occupied by reservation members only. They were not immediately open to white settlers.[3]

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[3] The Indians were, however, allowed to sell their homesteads after 25 years, just as Indians on treaty reservations could sell their allotments after 25 years. *See* General Allotment Act § 5, 24 Stat. 388, 389 (1887). A 1989 report by the Confederated Tribes of the Chehalis Reservation says that by 1967, 2,484.25 of the original 4,214.83 reservation acres had been transferred to non-Indians. The remaining 1,730.58 acres were tribal lands or trust lands held by descendants of the original allottees of the reservation. Confederated Tribes of the Chehalis Reservation, *The Chehalis People* (1989).

We conclude that the 1886 executive order did not diminish the size of the Chehalis reservation.[4] The Court's recent decision in *Hagen* does not require a contrary result. There, the Court found diminishment where a congressional act restored reservation land to the public domain. 114 S. Ct. at 966-67. The act, however, applied to surplus lands remaining after allotment of the reservation. *Id.* at 967. Also, it restored these lands to the public domain for sale or settlement by *non-Indians*. *Id.* at 961, 963-64. Here, as noted, the executive order restored lands solely to provide allotments to the members of the reservation. It applied only to Indians and involved no surplus land.

CONCLUSION

We affirm the district court's judgment rejecting the Tribes' claims to Quinault fishing rights and the claim to fishing rights based on Chehalis aboriginal title. We also affirm the judgment denying the Tribes' claims to off-reservation fishing rights based on the orders creating their reservations. We affirm the court's judgment that the Chehalis Reservation was not diminished by subsequent executive orders.

AFFIRMED.

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[4] We reach the same conclusion with respect to the 1908 and 1909 orders, which, following the form of the 1886 order, were meant to provide two homesteads from the 471-acre parcel reserved for the school.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	No. 9213 – Phase I Subproceeding No. 83-3 and No. 83-117T(C) ORDER RE REPORT AND RECOMMENDATION FILED ON OCTOBER 3, 1991 (Filed May 18, 1992)
CONFEDERATED TRIBES OF THE CHEHALIS INDIAN RESERVATION, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	

On October 3, 1991, United States Magistrate John Weinberg filed his Report and Recommendation and accompanying Proposed Findings of Fact and Conclusions of Law.

Timely objections and memoranda have been filed by the Shoalwater Bay and Chehalis Tribes. In addition, the Quinault Nation and Tulalip Tribes of Washington each

have timely filed limited objections and memoranda. The State of Washington and the United States also have filed pleadings responding to the arguments made by the respective tribes in their objections and/or memoranda.

The court has reviewed the pleadings, record, objections and memoranda in accordance with the governing standards of review. The court concludes that further oral argument in connection with these matters is not necessary.

Upon due consideration of the arguments of the parties and the record herein, the court vacates the proposed Findings of Fact Nos. 2, 19, 20 and 74 and substitutes therefore:

> 2. The Chehalis Indian Reservation is located near the confluence of the Black and Chehalis Rivers, near the town of Oakville, in Thurston and Grays Harbor Counties, Washington. Issues as to the boundary of the Chehalis Reservation are reserved for later determination.
>
> 19. By appropriating money in the Act of August 24, 1912, to pay the descendants of the Lower Chinook, Willapa, Kawalioqua and Wahkiakum, the Congress confirmed that it has extinguished all aboriginal land title of those Indians. The plaintiff tribes do not hold or possess aboriginal land title of the Lower Chinook, Wheelpa Chinook, Willapa (Kwaliqua), Wahkiakum Chinook, because those rights were taken and the extinguishment was later confirmed by payment under the Act of August 24, 1912.
>
> 20. By appropriating payment in the Act of August 24, 1912 to pay to the descendants of the

signers of the unratified Dart treaties with the Lower Band of Chinook and the Wheelpa Band of Chinook, Congress confirmed that it had taken all lands that would have been ceded by the treaties and had extinguished all aboriginal title.

74. The Executive Order creating the Chehalis Reservation must also be viewed in the context of the acculturation policy that pervaded the United States Indian Policy at the time. The United States intended to "civilize" Indians by teaching them cultivation and ways of non-Indian society. Although fishing is not inconsistent with farming or joining non-Indian society, the establishment of a reservation for farming or eventual allotment to individual Indians does not create or reserve by implication off-reservation fishing rights.

In all other respects, the court concurs with the Report and Recommendation and the Proposed Findings of Fact and Conclusions of Law and adopts them as its own.

ACCORDINGLY, IT IS ORDERED that the court adopts the Report and Recommendation filed on October 3, 1991.

IT IS FURTHER ORDERED that the Proposed Findings of Fact and conclusions of Law lodged on October 3, 1991, as modified by this order, are to be filed by the Clerk of the Court as the court's Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that this matter is remanded to Magistrate John Weinberg for further proceedings as set forth in the Report and Recommendation.

Dated: May 14, 1992

/s/ Robert E. Coyle
ROBERT E. COYLE
United States
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	CASE NO. 9213 – Phase I Sub-No. 83-3 and No. 83-117 (T)C
CONFEDERATED TRIBES OF THE CHEHALIS INDIAN RESERVATION, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed May 29, 1992)

On the basis of the testimony and other evidence admitted at trial, and the arguments of counsel, the following findings of fact and conclusions of law are recommended for adoption and approval by the court.

FINDINGS OF FACT

Identity of Tribes

1. The Confederated Tribes of the Chehalis Indian Reservation ("Chehalis Tribe") is composed of the descendants of Upper Chehalis who settled on the Chehalis Reservation. Membership in the Chehalis Tribe is drawn from the descendants of the Indians listed on the Chehalis Reservation census roll of January 1, 1939, and descendants of the original allottees of Chehalis Reservation land. Upper Chehalis, Lower Chehalis, Satsop, Cowlitz, or other particular tribal heritage is not a criterion for membership, [Ex. SH/CH-M-243; R. 258-59, 273-76], although the membership of the Chehalis Tribe is largely composed of persons of some degree of Upper Chehalis ancestry. [Ex. USA-M-42 at 1.] Members are not permitted to be enrolled in any other Indian tribe. [Ex. SH/CH-M-243.]

2. The Chehalis Indian Reservation is located near the confluence of the Black and Chehalis Rivers, near the town of Oakville, in Lewis County, Washington. Issues as to the boundary of the Chehalis Reservation are reserved for later determination.

3. The Shoalwater Bay Indian Tribe is composed of the descendants of a small group of Indians of Chinook and Lower Chehalis ancestry who settled on the Shoalwater Reservation. Membership is drawn from the descendants of 11 individuals whose names appear on the voter list for the 1935 Indian Reorganization Act election on the Shoalwater Reservation. [R. 562-63; Ex. SH/CH-M-218.] Chinook or Lower Chehalis ancestry is not a criterion for membership in the Shoalwater Bay

Indian Tribe, [Ex. SH/CH-M-76; R. 564], although the membership of the Shoalwater Bay Indian Tribe is largely composed of people of some degree of Lower Chinook and Lower Chehalis ancestry. [Ex. USA-M-42 at 1.] The Shoalwater Bay Constitution also prohibits members from being enrolled in any other Indian tribe. [Ex. SH/CH-M-76.]

4. The Shoalwater Bay Indian Reservation contains approximately 334 acres of land above the ordinary high water mark on the north end of Willapa Bay, in Pacific County, Washington. Whether the reservation boundaries included tidelands or the bed of the bay is reserved for later determination.

5. Neither the Confederated Tribes of the Chehalis Indian Reservation, the Shoalwater Bay Indian Tribe or the aboriginal tribal groups from which their membership is descended are party to the Treaty of Olympia (or Treaty with the Quinault). 12 Stat. 971, or any other ratified treaty with the United States. [Complaint No. 83-117 ¶4.5; Ex. USA-M-42 at 1.]

6. The Court has previously found that the Quinault Nation "is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Quinault Reservation and is composed of the Quinault and Queets Band of Indians, and other fish-eating Indians of the Olympic Peninsula who were allotted on the Quinault Reservation." *United States v. Washington*, 384 F. Supp. 312 at 374, FF. 119, (W.D. Wash. 1974).

7. The Quinault Nation is a political successor in interest of some of the tribes or bands which were parties to the Treaty of Olympia, *Id.* It possesses adjudicated off-

reservation treaty fishing rights. *United States v. Washington*, 384 F. Supp. at 374-75, FF. 120, 121; 459 F. Supp. 1020, 1097 (1978), *aff'd.*, 573 F.2d 1123, 1130-32 (9th Cir. 1978); 626 F. Supp. 1405, 1492, 1494, *aff'd.*, 761 F.2d 1419 (9th Cir. 1985).

8. Membership in the Quinault Nation is equally open to any individual who has 1/4 or more in the aggregate Quinault, Queets, Quileute, Hoh, Chehalis, Chinook, or Cowlitz ancestry and who is not a member of any other federally recognized tribe. [Ex. QN-M-315; R. 739.] The membership of the Quinault Indian Nation includes a large number of individuals of Chehalis, Chinook, and Cowlitz ancestry. [Ex. QN-M-323A; R. 740.] All enrolled Quinault tribal members have the same rights, privileges, and obligations. R. 739. Many members of the Quinault Nation who participate in its off-reservation fishery in Grays Harbor and the Chehalis and Humptulips Rivers possess Chehalis or Chinook ancestry. [R. 740-41.]

Claim to Aboriginal Fishing Rights

9. In 1851, Dr. Anson Dart negotiated treaties dealing with several groups of Chinook Indians on the Columbia River and on Willapa Bay. Among those treaties were treaties with the Wahkiakum Chinook, the Lower Chinook, and the "Wheelapa" Chinook. [Ex. W-M-15 (Wheelapa treaty); W-M-16 (Wahkiakum treaty); W-M-11 (Lower Chinook treaty).]

10. The 1851 Dart treaty with the Wheelapa purported to obtain a cession from the last remnants of the Kwalioqua Band of Indians. [Ex. W-M-15.]

11. The 1851 Dart treaties, as written, included certain provisions for a fishing right for the tribes who entered into the treaties. [Ex. W-M-15, 16, 11.] The treaties negotiated by Dr. Anson Dart were never ratified by the Senate and never became a law of the United States of America. [Tr. 816; Ex. USA-M-42 (Lane Written Direct) at p. 10.]

12. Dart's understanding was that he had purchased all of the lands of the various "tribes and bands" of Indians surrounding Willapa Bay and extending up the Columbia River for about 60 miles from its mouth. [Ex. USA-M-42, p. 8 (Also Lane Written Direct at p. 8).]

13. The 1851 Dart treaty with the Wheelapa Band of Chinook and Lower Chinook encompassed the area of Southwest Washington including the lands around Willapa Bay. The Wheelapa treaty made provision for a large general reservation encompassing Willapa Bay region and adjacent lands from the Chehalis River south. [Ex. USA-M-42, p. 3 (Also Lane Written Direct at p. 3; W-M-15 (Wheelapa treaty); W-M-112 (S. Rep. No. 503, 62d Cong., 2d Sess., pp. 2-3).]

14. The "Wheelapa Band of Chinook" were survivors of an Athabaskan speaking enclave who occupied headwaters of the Willapa River and Chinook speakers who occupied the lower reaches of the Willapa River. The "Lower Band of Chinook" included those Chinook bands that occupied Willapa Bay and the streams draining into it as well as those on the lower Columbia. [Ex. USA-M-42, p. 8 (Also Lane Written Direct, p. 8); USA-M-48 (Dart to Lea, 11/7/1851).]

15. The unratified Dart treaties with the "Wheelapa Band of Chinook" and "Lower Band of Chinook" contained land cession provisions [Ex. USA-M-46 (Lower Chinook article 1st); USA-M-47 (Wheelapa Chinook article 1st).] The Wheelapa treaty purported to cede:

> The said Wheelapa Band of Indians, hereby cede to the United States, all the land claimed or owned by the said Band. The land intended to be hereby ceded is bounded on the North by lands owned by the Cheehales tribe of Indians, on the East by lands of the Cowlitz Band of Indians, on the South by lands of the Waukikum and Lower Bands of Chinooks, and on the West by the Coast and Shoalwater Bay.

The Lower Chinook treaty purported to cede:

> Beginning at the mouth of a certain stream entering Gray's Bay, on the north side of the Columbia River, which stream forms the western boundary of lands, ceded to the United States by the Waukikum Band of Chinooks; running thence Northerly on said western boundary to lands of the Wheelapa Band of Indians; thence westerly along said lands of the Wheelapa Band, to the Shoalwater Bay; thence Southerly and Easterly following the Coast of the Pacific Ocean and the Northern shore of the Columbia to the place of beginning. The above description is intended to embrace all the lands owned or claimed by said Lower Band of Chinook Indians.

16. In about 1906, Dr. McChesney, working for the Indian Department was given the task of assembling the rolls of descendants of the Chinook people signatory to the unratified treaties of 1851.

17. On August 24, 1912, Congress appropriated money to compensate the descendants of the signers of the Anson Dart treaties. The 1906 McChesney rolls list the individuals to whom compensation was paid pursuant to the 1912 Act. [Tr. of October 15, 1990, p. 86.] Twenty thousand dollars was paid to the Lower Chinook. Five thousand dollars was paid to the Wheelapa Chinook Indians. Seven thousand dollars was paid to the Wahkiakum Chinook Indians. 37 Stat. 518, 535.

18. A congressional report accompanying the Act of August 24, 1912, reads:

> The [Dart] treaties were duly submitted by the President to the Senate for ratification, but they were neither ratified nor rejected. Nevertheless, the Government took possession of both the ceded and reserved lands, and most of them have been disposed of under the public-land laws. The Indians were disposed of all their lands and of all of the rights and privileges granted them by the [Dart] treaties.

[Ex. W-M-112 (S. Rep. 503, pp. 2-3).]

19. By appropriating money in the Act of August 24, 1912, to pay the descendants of the Lower Chinook, Willapa, Kwalioqua and Wahkiakum, the Congress confirmed that it had extinguished all aboriginal land title of those Indians. The plaintiff tribes do not hold or possess aboriginal land title of the Lower Chinook, Wheelapa Chinook, Willapa (Kwalioqua), Wahkiakum Chinook, because those rights were taken and the extinguishment was later confirmed by payment under the Act of August

24, 1912. The extinguishment of title to those lands extinguished all fishing rights in those areas. See Conclusions of Law 22 through 35.

20. By appropriating payment in the Act of August 24, 1912 to pay to the descendants of the signers of the unratified Dart treaties with the Lower Band of Chinook and the Wheelapa Band of Chinook, Congress confirmed that it had taken all lands that would have been ceded by the treaties and had extinguished all aboriginal title and any fishing rights related to those lands. The plaintiff tribes do not hold or possess aboriginal fishing rights in the area that would have been reserved or ceded by the Dart treaties, including Shoalwater Bay and its environs, as described ~~in Fin~~dings of Fact 12, 13, and 15, above.

21. Between 1854 and 1863, the Washington Territory Surveyor General surveyed approximately 2,800,000 acres. The survey was to prepare for land sales and dispersal of land for settlement by non-Indians. These lands were primarily in the Puget Sound and Southwest Washington area. The survey included all the townships around Grays Harbor and Shoalwater Bay and much of the Chehalis River valley. [Tr. 983-990.]

22. In 1863, Abraham Lincoln issued an Executive order that opened lands in Southwestern Washington for sale or settlement by non-Indians. The opening of lands for sale in 1863 was inconsistent with tribal exclusive use and occupancy of any remaining Indian tribes and extinguished any remaining aboriginal title in Southwest Washington, including Grays Harbor and Willapa Bay.

23. The Court finds that the United States took the aboriginal title of the Upper and Lower Chehalis, Cowlitz, Chinook, and all other Indians in Southwest Washington by its actions in settling or conveying the lands to non-Indians. That extinguishment occurred not later than 1863.

24. The plaintiff Confederated Tribes of the Chehalis Indian Reservation, along with individual Indians, brought an action before the Indian Claims Commission to ask for compensation for the extinguishment of the aboriginal title of the Upper and Lower Chehalis Indians. [Ex. W-M-126 (Complaint, ¶ X).]

25. The Indian Claims Commission found that the United States had previously extinguished the aboriginal title of the Upper and Lower Chehalis Indians and made a finding as to the land which those groups had held by aboriginal title. [Ex. W-M-129 (8 Ind. Cl. Com. 436).] The parties to the Chehalis Indian Claims Commission proceeding litigated the area of aboriginal title taken but did not litigate the value of that taking. Instead, the claim was settled on an amount of damages of $754,000. [Ex. SH/CH-M-414 (12 Ind. Cl. Com. 644).]

26. The I.C.C. made a specific finding that a Lower Chehalis Tribe held aboriginal title to a certain area, and an Upper Chehalis Tribe held aboriginal title to an adjacent area. [Ex. W-M-129 (8 Ind. Cl. Com. at 461-62).] The I.C.C. found that after abortive treaty negotiations in 1855, that as of March 3, 1855, the United States dealt with all Upper and Lower Chehalis lands as public lands and extinguished the aboriginal title to those lands. [Ex. W-M-129 (8 Ind. Cl. Com. at 462).] In 1964, Congress

appropriated money to pay the Chehalis Indian Claims Commission award. P.L. 88-317, 78 Stat. 204 at 213. [Ex. W-M-154.]

27. Congress did not pay the Chehalis Indian Claims Commission award to the plaintiff Confederated Tribes of the Chehalis Indian Reservation nor to the Shoalwater Bay Indian Tribe. Instead Congress charged the Bureau of Indian Affairs with compiling a roll of persons who were descended from the aboriginal Chehalis Indians. 25 U.S.C. §1151. Congress made the payment to that roll of descendants.

28. The extinguishment of Upper Chehalis and Lower Chehalis aboriginal title found by the I.C.C. included subsidiary Indian groups labelled as the Satsop Tribe, Humptulips Tribes, Hoquiam, Wynoochee, and Wiskah Indians. [Ex. W-M-129 (8 Ind. Cl. Com. at 460).]

29. An individual Indian named Simon Plamondon brought a claim on behalf of the Cowlitz Tribe of Indians. [W-M-138]. The I.C.C. found that a Cowlitz Tribe of Indians once held aboriginal title to lands in Southwestern Washington, and that following the Presidential Proclamation of March 20, 1863, the United States extinguished aboriginal title of the Cowlitz Tribe. [Ex. W-M-138 (25 Ind. Cl. Com. at 441-42).]

30. Upon report of the I.C.C. that it found that aboriginal title of the Cowlitz Tribe had been extinguished without compensation, Congress appropriated funds to pay the award of the I.C.C. [Ex. W-M-154.]

31. Various persons brought a claim to the I.C.C. on behalf of the Chinook Tribe of Indians. The I.C.C. found

that a Chinook Tribe of Indians once held aboriginal title to lands in Southwestern Washington, but that the United States had extinguished all aboriginal title to the Chinook. Tribe. [Ex. SH/CH-M-86.]

32. Upon report of the I.C.C. that it found that aboriginal title of the Chinook Tribe had been extinguished without fair compensation, Congress appropriated funds to pay the award of the I.C.C. [Ex. W-M-154.]

33. All aboriginal fishing rights of groups to which plaintiff tribes claim successorship were extinguished with aboriginal title.

34. The conduct of the United States government in appropriating money to pay the I.C.C. awards confirms that the United States government had in fact extinguished the aboriginal title of the Upper Chehalis, Lower Chehalis, Cowlitz and Chinook Indians as found by the I.C.C.

35. The plaintiff tribes cannot claim the aboriginal fishing rights of the Upper Chehalis, Lower Chehalis, Humptulips, Satsop, Hoquiam, Wynoochee, Wiskah, Cowlitz, and Chinook Indians because those aboriginal fishing rights, to the extent they once existed, were extinguished with aboriginal land title.

Claim to Rights Under Treaty with Quinaults

36. On August 30, 1854, the Acting Commissioner of Indian Affairs notified Governor Isaac I. Stevens of his appointment to negotiate treaties with all tribes in the Washington Territory. *United States v. Washington*, 384 F. Supp. at 354, FF 17. [Ex. USA-M-52.]

37. The United States' principal purposes were to extinguish Indian claims to the land in Washington Territory and provide for peaceful and compatible coexistence of Indians and settlers, and between settlers and the government. 384 F. Supp. at 355, FF 19. [R. 103-04, 616.]

38. In December, 1854 and January, 1855, Governor Stevens negotiated the Treaties of Medicine Creek, 10 Stat. 1132; Point Elliot, 12 Stat. 927; Point No Point, 12 Stat. 933; and Makah, 12 Stat. 939.

39. On February 24, 1855, Governor Stevens arrived on the Chehalis River to hold a treaty council with all of the remaining Indians of Western Washington of which his treaty commission had knowledge, except for part of the Klickitat and Upper Chinook which were not invited. [Ex. USA-M-42 at 16; USA-M-59 at 1; R. 1083.]

40. On February 27, 1855, the Treaty Council was commenced with representatives of the Upper Chehalis, Lower Chehalis, Cowlitz, Lower Chinook, Quinault and Queets tribes present. [Ex. USA-M-59 at 1-2.] In the proposed treaty presented by Governor Stevens, the United States sought a voluntary cession of the Indians' lands. In exchange for the cession the treaty would have reserved to each of the tribes the "right of taking fish at all usual and accustomed grounds and stations" and provided for the establishment of a reservation to be located between Grays Harbor and Cape Flattery. [Ex. USA-M-59 at 20-21.]

41. Representatives of the Chehalis, Chinook, and Cowlitz objected to being placed on a single reservation north of Grays Harbor and refused to sign the treaty. [Ex. USA-M-42 at 17-20; USA-M-59.] They sought reservations in their own territories and the right to continue fishing

at their own fisheries. [Ex. USA-M-42 at 18-20; USA-M-59; R. 102-03.] Only the Quinault and Queets, together with Governor Stevens, signed the offered treaty. [Ex. USA-M-59 at 12, 23.] When it became clear that the other tribes were unwilling to sign, Governor Stevens terminated the treaty council and announced that there would be no treaty. [Ex. USA-M-42 at 20; USA-M-59 at 12-19.]

42. At the Treaty Council Governor Stevens learned for the first time of the existence of the Quileute and Hoh. [Ex. USA-M-42 at 16; USA-M-59 at 1-2; R. 613-14.] Governor Stevens returned to Olympia where, before leaving for treaty negotiations in eastern Washington, he prepared a new treaty draft covering only the Quinault, Quileute, Queets, and Hoh. [Ex. USA-M-42 at 21; R. 106, 115.] The new treaty draft added the Quileute and Hoh as parties. References to the Upper Chehalis, Lower Chehalis, Chinook and Cowlitz, who were not to be party to it, were deleted. The cession area described in the treaty and the amount of money to be paid were amended to reflect the change in parties, and instead of providing for the establishment of a single reservation, it provided for the reservation of a "tract or tracts." [Ex. USA-M-42 at 22; *compare* Ex. USA-M-59 at 20-23 to Ex. SH/CH-M-266 (12 Stat. 971).] The change allowing the establishment of more than one reservation likely was made in order to avoid a second failure to conclude a treaty in the event the Quileute and Hoh resisted removal to the Quinault Reservation. In fact, the Quileute and Hoh did refuse to leave their territories and separate reservations were eventually established for them. [Ex. USA-M-42 at 23.]

43. Governor Stevens gave instructions to Michael Simmons to obtain the signatures of the Quinaults and Quileutes on the revised treaty. [Ex. USA-M-60.] Simmons met with the Quinault, Queets, Quileute, and Hoh at the Quinault River on July 1, 1855, and obtained their agreement to the Treaty with the Quinault. [Ex. QN-M-133 at 4; Ex. USA-M-42 at 22.] Governor Stevens signed the Treaty in Olympia on January 25, 1856, hence its alternate name, the Treaty of Olympia. [Ex. USA-M-42 at 22.]

44. Governor Stevens also instructed Simmons to advise the other groups who had been at the Chehalis River Council in February, 1855 that he would treat with them further in Olympia. Governor Stevens apparently intended to attempt to negotiate a separate treaty with the Chehalis, Chinook, and Cowlitz groups on his return from eastern Washington. [Ex. USA-M-42 at 23-24; USA-M-60; R. 115-16, 1084-85.] Governor Stevens also appears to have considered the possibility that he would be unable to conclude a treaty with these groups and suggested to the Commissioner of Indian Affairs that in such event Congressional action removing them might be necessary. [Ex. USA-M-42 at 24; USA-M-62.] In contrast to his insistence at the Chehalis River Council that the Chehalis, Chinook and Cowlitz remove to a reservation north of Grays Harbor, Governor Stevens instructed Simmons to advise the Upper Chehalis and Cowlitz that they might be incorporated with the Nisqually, and that the Chinooks, Shoalwater Bay and Lower Chehalis might have their own reservation with fishery and potato grounds. [Ex. USA-M-42 at 24; USA-M-60; R. 1056-58.]

45. Before Governor Stevens could return to conduct further treaty negotiations with the Chehalis, Chinook, and Cowlitz, war broke out and occupied his attention. After the war Congress refused to ratify the treaties that Stevens had already negotiated or pay the expenses of the war. Stevens returned to Washington, D.C. to lobby for ratification of the treaties and funds. The civil war and its aftermath followed. In this unsettled period no further arrangements were made to treat with the Chehalis, Chinook, and Cowlitz and a treaty was never concluded with them. [R. 215-17.]

46. The Treaty with the Quinault was ratified in 1859. [Ex. SH/CH-M-266 (12 Stat. 971).] No evidence was presented that the Senate understood the Treaty to deal with any tribes other than the named parties, nor is there any evidence to suggest that Stevens, Simmons or any other officer of the United States involved in the negotiation of the Treaty thought it dealt with the Chehalis, Cowlitz, or Chinook. [R. 623-24.] Similarly, there is no evidence to suggest that the Quinault, Quileute, Hoh, or Queets parties to the Treaty thought it dealt with the other tribes who had been at the failed Chehalis River Council. [R. 624.] Moreover, after the negotiation of the Treaty, the Chehalis, Chinook, and Cowlitz thought they were still to be treated with and expressed a desire to treat, [R. 624-25; Ex. W-M-40 at 13], indicating their understanding that the Treaty with the Quinault did not deal with them. [*See* R. 636.] The general understanding that the Chehalis, Chinook, and Cowlitz were not dealt with through the Treaty with the Quinault is further confirmed by consistent reports of the local agents published in Annual Reports of the Commissioner of Indian

Affairs describing these groups as "not treated with," "not party to any treaty" or the like. [*See, e.g.*, Ex. QN-M-53 at 334; QN-M-54 at 233; QN-M-55 at 397, 404; QN-M-56 at 422; QN-M-58 at 536; QN-M-60 at 76-79; QN-M-68 at 278; QN-M-77 at 150.]

47. There is no evidence to suggest that the tribes that were parties to the Stevens treaties understood the treaties to provide for the sharing or transfer of the fishing rights among the tribes party to the treaties. [R. 625, 627-8.] Similarly, there is no evidence to suggest that the United States or the tribes party to the Treaty with the Quinault understood it to provide for the transfer or sharing of fishing rights reserved by the tribal parties with tribes not party to the Treaty. [R. 629.]

48. In 1859 it was decided to protect land for the Upper Chehalis and Satsop at the confluence of the Black and Chehalis Rivers and notice was published that a reservation would be established at that location. [R. 631-32; Ex. USA-M-42 at 36; QN-M-163-64.] A portion of this land was eventually set aside as the Chehalis Reservation. [Ex. USA-M-42 at 36.] Instead of a treaty, the Chehalis Reservation was set apart by Secretarial Order of July 8, 1864, after the Commissioner of Indian Affairs advised the Secretary of the Interior that the Chehalis had resisted all suggestions to jointly occupy other reservations. [Ex. USA-M-42 at 38; SH/CH-M-319.] Two years later the Shoalwater Reservation was established by Presidential Executive Order of September 22, 1866. [Ex. USA-M-42 at 39; SH/CH-M-36.] Both Orders are limited to reservations of specifically described lands. They contain

no language in any way comparable to the express reservation of off-reservation fishing rights contained in the Stevens treaties.

49. The Treaty with the Quinault does not designate the location of the reservations to be established for the Indian parties. In 1859 after the ratification of the Treaty, Michael Simmons proposed establishment of a reservation encompassing approximately six sections between Point Grenville and the mouth of the Quinault River. [Ex. USA-M-79; QN-M-56 at 419-20.] The reservation was surveyed in 1862. [Ex. USA-M-42 at 26.]

50. In 1871 only the Quinaults were living on the reservation. [Ex. QN-M-68 at 288.] At the time there were only three reservations in southwestern Washington. [Ex. USA-M-42 at 29.] In addition to the three reservation communities there were a number of small bands of Indians who had not moved to any reservation whose tenure was threatened by settlers and land speculators. [*Id.* at 29-30.]

51. Superintendent Milroy in his 1872 annual report proposed the enlargement of the Quinault Reservation. [Ex. USA-M-42 at 26-28; QN-M-69 at 339-41.] Milroy proposed that the Quileute, Hoh, and Queets, together with other Indians could be collected on the enlarged reservation. [Ex. QN-M-69 at 341.] The Quinault Reservation was enlarged in accordance with Milroy's recommendation by Executive Order of November 4, 1873. [Ex. SH/CH-M-401; QN-M-183.]

52. In the same 1872 annual report proposing enlargement of the Quinault Reservation, Superintendent Milroy also proposed a program for the improvement of

the Chehalis Reservation. [Ex. QN-M-69 at 334-35.] It does not appear that the United States intended to relocate people already located on the Chehalis and Shoalwater Bay Reservations to the Quinault Reservation in connection with the 1873 Executive Order. [R. 632-33.]

53. No evidence was presented that the 1873 Executive Order enlarging the Quinault Indian Reservation was intended to grant treaty rights to the Chehalis, Chinook, or Cowlitz. The evidence presented is to the contrary. The Chehalis, Chinook, and Cowlitz received no treaty annuities. [R. 634.] Moreover, because the Chehalis were not party to a treaty providing for allotment of land to individuals, allotment of the Chehalis Reservation was accomplished through an 1886 Executive Order restoring much of it to the public domain so that patents could be issued under the Indian Homestead Acts. [Ex. USA-M-42 at 42-44.]

54. Census data collected in 1878 show 103 Indians belonging to the Shoalwater Bay Reservation, [Ex. USA-M-87], 205 Indians belonging to the Chehalis Indian Reservation, [Ex. USA-M-89], and 164 Indians belonging to Lower Chehalis and Grays Harbor Indians, [Ex. USA-M-88.] The latter people remained living around Grays Harbor and the lower waters of the streams draining into it and refused to move to a reservation. [Ex. QN-M-74 at 141.] Over time many of the Grays Harbor and Lower Chehalis moved to the Quinault Reservation and assimilated into the Quinault Nation [Ex. SH/CH-M-316 at 20-21.] Some moved to the Chehalis Reservation, some to the Shoalwater Reservation, and an indefinite number remained scattered around the Harbor. [*Id.*; R. 161-64.]

55. In 1905, allotment of the Quinault Reservation commenced. [Ex. USA-M-42 at 30.] In June of that year the allotting agent was instructed to take applications for allotment from Quinaults, Quileutes, Queets, Hohs, and members of those tribes which the Central Office had been advised were occupying the Reservation. [*Id.*; Ex. SH/CH-M-171; R. 637.] In October, the allotment instructions were amended and clarified to restrict allotment at Quinault to Indians having no rights in land on another reservation. [Ex. SH/CH-M-263; USA-M-42 at 31.] Later instructions in 1906 specifically provide that Quileute and Hoh Indians located on the Quileute and Hoh Reservation are not entitled to an allotment at Quinault. [Ex. SH/CH-M-263.]

56. Shoalwater Bay Indians were allotted at Quinault based on the erroneous impression that they were resident on the Quinault Reservation. [R. 639-41.] Indians of the Chehalis, Hoh, and Quileute Reservations, however, were not allotted. [R. 641; Ex. SH/CH-M-263.]

57. Legislation was introduced in 1910, (SB 5269), to authorize allotment of surplus land of the Quinault Reservation remaining after allotment of the Indian residents to Quileute, Hoh, and Ozette Indians desiring allotments at Quinault, rather than at the Reservations set aside for their own tribes. [Ex. USA-M-42 at 31; QN-M-229.]

58. Subsequently, the Secretary of the Interior proposed an amendment to this legislation to also authorize allotments of surplus Quinault Reservation land to members of "other tribes of Indians in Washington, who are affiliated with the Quinaeilt and Quileute Tribes in the treaty of July first, eighteen hundred and fifty-five, and

January twenty-third, eighteen hundred and fifty-six. . . ." [Ex. QN-M-252.] The Secretary of the Interior advised the Chairman of the House Committee on Indian Affairs that the amendment was designed principally to provide for allotment of certain unallotted Clallam and Squaxin Island Indians who the Secretary stated "were at one time affiliated with the Indians on the Quinault Reservation." [Ex. SH/CH-M-259.9; QN-M-260.]

59. At the time, both the Squaxin and Clallam had been lobbying for land. [R. 643-45.] The Squaxin and Clallam Tribes are respectively parties to the Treaties of Medicine Creek and Point No Point and each reserved its own right to fish at Squaxin and Clallam usual and accustomed fishing places under those treaties. 646. *See United States v. Washington*, 384 F. Supp. at 348-49; 377-78; 459 F. Supp. at 1039-41. The Secretary's description of the Squaxin and Clallam as "affiliated" with the Indians of the Quinault Reservation and his use of the term in the proposed amendment to the allotment bill is not readily explained. [R. 646.]

60. SB 5269 was enacted with the amendment proposed by the Secretary of the Interior added in the House. [Ex. QN-M-333 at 3937; R. 646; SH/CH-M-46, Act of March 4, 1911, 36 Stat. 1345.] The Act provides in its entirety:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be, and he is hereby, authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members

> of the Hoh, Quileute, Ozette or other tribes of Indians in Washington, who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes, *Provided*, That the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed.

[Ex. SH/CH-M-46, Act of March 4, 1911, 36 Stat. 1345.]

61. The intent of the Act was to authorize Indians whose reservation contained insufficient land for allotment to take allotments from the "surplus land" at Quinault that remained after the allotment of Reservation residents. [*Id.*; Ex. QN-M-235; QN-M-258; QN-M-252; SH/CH-M-259.9; QN-M-333; R. 684-85.] The legislative history and correspondence relating to the Act of March 4, 1911, do not discuss the Shoalwater Bay or Chehalis Tribes, nor do they discuss the transfer or sharing of treaty fishing rights. [R. 646-47, 684-85.]

62. In 1931, the Supreme Court construed the Act of March 4, 1911, to permit the allotment of Chehalis, Chinook, and Cowlitz Indians from the surplus lands of the Quinault Reservation, if they were without allotment elsewhere. *Halbert v. United States*, 283 U.S. 753, 760 (1931). However, only Chehalis who did not have land at the Chehalis Reservation received allotments at Quinault. [R. 647.]

63. No band or group of Quinault, Quileute, Hoh, or Queets parties to the Treaty with the Quinault merged into or consolidated with the Confederated Tribes of the Chehalis Indian Reservation or the Shoalwater Bay Indian Tribe. [R. 647-48.]

64. The Quinault Indian Nation, Hoh Indian Tribe, and Quileute Indian Tribe are the only Indian tribes recognized by the United States as possessing off-reservation fishing rights reserved pursuant to Article 3 of the Treaty with the Quinault, 12 Stat. 971. [Ex. QN-M-329 at 12.] Both the United States and Quinault Nation take the position that the plaintiff tribes do not possess any fishing rights pursuant to that treaty. [*Id.*]

Claims Based on Executive Orders

65. During the Indian Wars of 1856, a subagent, Sidney Ford, wrote Governor Stevens a letter describing his efforts to keep the Chehalis peaceful and located around Ford's Prairie. [Tr. 85-51; W-M-40 (10/10/1856 Letter Ford to Stevens, p. 13).] Ford recommended a reservation at that location. On November 30, 1856, Ford wrote Stevens again urging a reservation at the Chehalis River for the Upper Chehalis Indians. Ford recommended a separate reservation for Lower Chehalis Indians and Indians on Shoalwater Bay. [Tr. 851-52; W-M-42.] Both letters demonstrate the Indian agent's concern with whiskey traffic and promoting farming amongst Indians. Sidney Ford renewed these recommendations in 1857. [Ex. QN-M-53 (Report of Sidney Ford 6/30/1857); Tr. 853-54.] By 1857, however, Stevens indicated that he had no instructions to make any treaties with the Cowlitz and

Chehalis Indians. [W-M-45 (Stevens to Pomroy 1/31/1857).]

66. After Stevens left Washington Territory in 1857, the Indians remained in the area of the Chehalis River. In 1859, Michael Simmons published a notice in the newspaper advising the public that the government would reserve lands on the Chehalis River for an Indian reservation. [Lane Written Direct, p. 36.] The large reservation described in 1859 was not made. While proposing a reservation at Chehalis River, Simmons made it clear that the reservation would not be suited for Chinook and Lower Chehalis Indians who had previously lived near the seashore. [Ex. SH/CH-M-257 (Letter Simmons to Geary 7/1/1860).] No lands were reserved in 1860.

67. In June 1862, the new Superintendent of Indian Affairs for Washington Territory, Hale, began an effort to deal with the non-treaty Upper Chehalis Indians. On July 3, 1862, Hale wrote to Commissioner of Indian Affairs Dole and reported that the Chehalis would not consolidate with the Nisquallys. He did report that they would enter into a treaty and take a reservation of about four sections of land at the confluence of the Black and Chehalis Rivers. Hale urged the Commissioner of Indian Affairs to authorize a treaty with those Indians. [Tr. 857-58; W-M-59 (6/3/1862, Letter Hale to Dole); SH/CH-M-264.5 (7/3/1862 Letter Hale to Dole).]

68. Hale did not get an immediate response from Commissioner of Indian Affairs Dole and in March of 1863, he reported that he was locating Upper Chehalis Indians at the confluence of the Black and Chehalis Rivers. [Tr. 860-61; W-M-63 (3/30/1863 Letter Hale to

Dole).] In 1863, however, Hale substantially changed the nature of his recommendation and recommended no treaty or treaty promises. He wrote:

> For the lands necessarily taken from them the government should evince its magnanimity in making ample provision for their protection and welfare. I do *not*, therefore, propose to have any treaty made either with the Chehalis or Colville or any other Indians within the bounds of this superintendency who have yet been made parties to any treaty. What may be done for these Indians in the way of providing an agent to take care of and employees to instruct them . . . will be more kindly received by them, and considered as presents and favors, to be given or withheld at pleasure, instead of a consideration which they have the right to expect and demand. In this way, too, we shall avoid the violation of treaty stipulations. Some such courses I have thus indicated will, I believe, be more satisfactory to the Indians themselves, and will in the end be more safe and economical to the department.

[Ex. QN-M-59, p. 442 (9/1/1863 Report Hale to Dole).]

69. Hale arranged for a survey and description of his proposed Chehalis Indian Reservation. [Ex. QN-M-59, p. 443.] The description was forwarded to Commissioner of Indian Affairs Dole. On May 17, 1864, Commissioner Dole recommended to the Secretary of Interior that he reserve lands recommended by Superintendent Hale. [Ex. SH/CH-M-335 (5/17/1864 Letter Dole to Secretary of Interior).] The recommendation of Commissioner of

Indian Affairs Dole clearly referred to the recommendations and proposals that had been approved by Superintendent Hale.

70. In reserving lands for the Chehalis Indian Reservation, the Secretary of Interior had no intention to impliedly [sic] create a treaty right.

71. In reserving lands for the Chehalis Indian Reservation, the overwhelming motivation was to secure lands for the Indians before the lands were settled by non-Indians. That the United States recognized the validity of non-Indian settlements is demonstrated by the fact that the United States paid for the private land claim of D. Mounts, which was within the six sections of land reserved for the Chehalis Indian Reservation. [1 Kapler 903 (7/8/1864 Secretarial Order).] The year before the order reserving lands for the Chehalis Reservation, Superintendent Hale reported that he had surveyed boundaries for a reservation.

> But the most serious defect of all is, that no official information of the recognition and approval of any of the Indian reservations by the President or the Department [of Interior] has been given to the Commissioner of the General Land Office, so as to enable him to instruct the proper officers here to reserve the same from entry [by non-Indians]. The difficulty became very manifest *when the lands were offered for public sale*. . . . Unless different instructions on this point are given by the Commissioner, the difficulty may be very soon revived, as parties are not infrequently applying to enter lands which are included within the bounds of our Indian reservation.

[Ex. QN-M-59 (9/1/1863 Report Superintendent Hale to Commissioner Dole).] The express motivation for the July 8, 1864 Secretarial Order reserving lands for the Chehalis Indians was to reserve the lands from entry by non-Indians. The order addressed the problem of landless Indians and showed no intention to deal with tribal off-reservation rights.

72. In recommending the Chehalis Indian Reservation to the Secretary of Interior, Commissioner Dole expressly stated that "it will also be necessary, doubtless, to make some provision for them after they shall have been assured of the quiet and permanent after possession of the proposed reservation for a future home. But this may subsequently receive the attention of the Department. These Indians are represented to be a very hopeful condition. They wish to abandon a roving life; to establish themselves in houses and cultivate their lands; to educate their children, and live peaceably with all." [1 Kapler 902; SH/CH-M-315 (5/17/1863 Letter Commissioner Dole to Secretary of Interior).] That the lands would be cleared and farmed and that the United States had not made all provisions demonstrates that there was no United States intent to create or reserve any off-reservation fishing right by implication.

73. Indians of Southwest Washington had relied upon fish long before the arrival of non-Indians. The location for the Chehalis Indian Reservation had referred to the proximity of fish in the Chehalis River. The fact that the United States considered the proximity of fisheries does not demonstrate the United States' intent to create an off-reservation fishing right for the eventual occupants of the Chehalis Indian Reservation.

74. The Executive Order creating the Chehalis Reservation must also be viewed in the context of the acculturation policy that pervaded United States Indian Policy at the time. The United States intended to "civilize" Indians by teaching them cultivation and ways of non-Indian society. Although fishing is not inconsistent with farming or joining non-Indian society, the creation of a tribal off-reservation fishing right is inconsistent with the intention of making a reservation for farming and eventual allotment to individual Indians. [Tr. 864-65; Ex. QN-M-60 (Annual Report including Letter of Superintendent Hale 8/8/1864, p. 58, and Letter of Dole to Secretary of Interior 5/17/1864, p. 77-78).]

75. The Executive Order reserving lands for the Chehalis Indians was not conditional or based upon agreement with the Indians. The Upper Chehalis Indians at that location did not believe or understand that they were obtaining a treaty or treaty rights, nor did they believe they were obtaining any off-reservation fishing right from the United States.

76. There is less written record concerning the reservation of lands for the Shoalwater Bay Indian Reservation. A May 2, 1866, letter from Giles Ford to the new Superintendent of Indian Affairs, Waterman, reports that he had visited Shoalwater Bay and examined a spot that the Indians wanted reserved. He reported that it would be a good home for them being situated in close proximity to good fishing, hunting, and grazing grounds. He recommended that it be immediately reserved from sale. [Ex. SH/CH-M-34; Tr. 870.] Superintendent Waterman enclosed Giles Ford's letter and supported his recommendation in a June 1, 1866, letter to the Secretary of the

Interior. [Ex. SH/CH-M-35.] Waterman submitted a map of the proposed reservation.

77. The primary purpose of the Shoalwater Bay Reservation was to reserve lands for Indians and prevent the lands from being taken by non-Indians. Superintendent Waterman's letter stated "they desire a place upon a shore where they can fix their homes, without being exposed to being supplanted and driven off by White men." [Ex. SH/CH-M-35.] The Executive order reserving lands was executed September 22, 1866, by President Andrew Johnson. The order is handwritten on a map of the reservation. The language of the Executive Order expressly refers to the need to reserve the land from sale:

> Let the tract of land as indicated on the within diagram be reserved from sale and set apart for Indian purposes . . .

[Ex. SH/CH-M-37.]

78. There is no express intent by the Executive to create or reserve any off-reservation fishing right for Indians who might occupy the Shoalwater Bay Reservation. There is no express or implied intent that a treaty right was being reserved or created for Indians who might later occupy the reservation.

79. Superintendent Waterman referred to 30 or 40 families who had lived upon the beach. Those Indians did not understand that they were entering a treaty or obtaining any off-reservation fishing rights. There is no indication that the United States thought it was dealing with a tribe or a group with tribal rights in 1866.

80. There was no executive intent or United States intent to create or reserve off-reservation fishing rights for any group of Indians or for the eventual occupants of the lands reserved on Shoalwater Bay. That the lands were proximate to fishing and other resources was a factor in selecting the location, but this does not amount to the creation of a special off-reservation fishing right.

81. The Shoalwater Bay Indian Reservation appears to have been overlooked by the local superintendent. The reservation is not mentioned in the annual reports. [Ex. QN-M-69 (1872 Report).] The 1872 Annual Report recognizes a Chehalis Indian Reservation and indicates that Indians of the Cowlitz, Chinook, Shoalwater Bay, and Humbolt Tribes did not occupy the Chehalis Reservation. In a latter [sic] dated September 2, 1876, Superintendent Milroy wrote to Commissioner of Indian Affairs Smith and stated:

> I have during the past month visited the reservations under may [sic] charge, including the Shoalwater Bay Reservation. It was set apart as an Indian reservation by Executive Order of September 22, 1866 – near ten years ago. But its existence as an Indian reservation was unknown to any officer of the Indian Bureau in this Territory until I accidentally discovered it a short time before the abolishing of my office as Superintendent of Indian Affairs of this Territory; and my visit during August this past past [sic] was the first visit ever made to it by any officer of the Indian Bureau. It consist [sic] of about 340 acres; about one third of which is good agricultural land; but it is heavily timbered. I found but two families residing on the reservation. I sent word in advance for all the Indians

> instructed on that reservation to meet with them on the 19th and about 50 men, women and children met me there at that time and I had a long conference with them. Their reasons for not coming onto the reservation heretofore was that they were uncertain about their title to it, but did not have a chief in whom they had confidence.

[Ex. W-M-90 (Letter, Milroy to Commissioner of Indian Affairs 9/2/1876).]

82. There is no evidence or indication that any Indians understood the 1866 Executive Order to be creating or reserving off-reservation rights associated with the Shoalwater Bay Reservation.

83. In the annual reports following 1864 and 1866, the United States never took the position that Indians of the Chehalis or Shoalwater Bay Indian Reservations had off-reservation fishing rights. The United States consistently took the position that they were non-treaty Indians and did not have treaty rights. In particular, the Solicitor's Office in 1942 took the position that Chehalis Indians had no special off-reservation rights. [Ex. SH/CH-M-116 (Swindell Report).] In 1952, the Solicitor's Office took the position that members of the Chehalis Tribe must comply with state laws and regulations outside the boundaries of their reservation. [Ex. W-M-124, p. 3.] In 1975, the Regional Solicitor took the position that the Chehalis Tribe had no off-reservation fishing rights. [Ex. W-M-142.]

84. The subsequent interpretation of the United States confirms that there was not United States intent to create or reserve any off-reservation fishing rights with

the Executive Orders reserving lands for the Chehalis and Shoalwater Bay Indian Reservations.

85. Although the Annual Reports of the Commissioner of Indian Affairs referenced treaty fishing rights, those reports distinguish Chehalis and Shoalwater Bay Indians as non-treaty, and never indicate or imply that Chehalis or Shoalwater Bay Indians possess some other type of fishing right. [*E.g.*, Ex. QN-M-89, p. 462 (discussing treaty fishing).]

CONCLUSIONS OF LAW

On-Reservation Fishing Rights

1. The Chehalis and Shoalwater Bay Tribes are entitled to fish within their respective reservations. Issues as to the boundaries of those reservations, and as to authority to manage that fishing, have been deferred until the next stage of this litigation. The balance of these Conclusions of Law address the rights of these tribes to fish off their respective reservations.

Claims to Rights Under Treaty with Quinaults

2. The Chehalis and Shoalwater Bay Tribes who claim that they have acquired a share of Quinault treaty rights bear the burden of proof with respect to their claims. They have "the burden of proving that they are entitled to exercise tribal treaty rights." *See United States v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); *see also United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 (9th Cir. 1990);

United States v. Lummi Indian Tribe, 841 F.2d 317, 318 (9th Cir. 1988).

3. "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations. . . . Accordingly, it is the intentions of the parties . . . that must control any attempt to interpret the treaties." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 675-76 (1979); *Swim v. Bergland*, 696 F.2d 712, 716 (9th Cir. 1983). Where as in this case the parties to the treaty agree on the meaning of the treaty, the Courts must generally defer to their interpretation. *Sumitomo Shoji, America, Inc. v. Avagliano*, 457 U.S. 176, 184 (1982).

4. The refusal of the Chehalis, Chinook, and Cowlitz to sign the treaty offered at the Chehalis River Council; Governor Stevens' subsequent removal of the Chehalis, Chinook, and Cowlitz from the Treaty negotiated with the Quinault and Quileute at the Quinault River on July 1855; and, his instructions to Michael Simmons that the other tribes who had been at the Chehalis River Council would be the subject of later, separate treaty negotiations confirm that the Treaty with the Quinault itself was not intended to, and did not, deal with the Chehalis, Chinook, and Cowlitz or grant them a share of the fishing rights reserved by the Quinault.

5. Both this Court and the Court of Appeals have held that a consolidation or merger of tribal groups is required for one tribe to obtain the treaty fishing rights of another tribe under the Stevens' treaties. *See United States v. Washington*, No. 9213 Sub No. 85-1, Order Adopting the Special Master's Report and Recommendation, entered

February 27, 1989 (Docket No. 11202), *aff'd. sub nom. United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990). The Court of Appeals affirmance states that for one tribe to acquire the treaty fishing rights of another tribe,

> it must first show that the two tribes or cohesive bands thereof consolidated or merged and demonstrate also that together they maintain an organized tribal structure.[11]

> [11] A tribe must also show that it 'descended from a treaty signatory.' *Washington*, 641 F.2d at 1371. In this instance, however, the district court previously determined that the Suquamish and Duwamish were treaty signatories and that the contemporary Suquamish descended from the treaty time Suquamish.

United States v. Suquamish Indian Tribe, 901 F.2d 772, 776 (9th Cir. 1990). (Footnote in original.)

6. The Chehalis and Shoalwater Tribes have not made the required showing. The Confederated Tribes of the Chehalis Indian Reservation and the Shoalwater Bay Indian Tribe are neither "descended from a treaty signatory," nor tribal entities formed by the consolidation or merger of nontreaty groups with any band of Quinault, Queets, Hoh or Quileute. They therefore do not possess rights under the Treaty with the Quinault unless the United States, through some post-treaty action, appropriated those rights for the benefit of the two tribes.

7. In assessing post-treaty actions, the Court notes that the appropriation of the property of a tribe by the United States for the use of another tribe is a taking.

Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937); *United States v. Creek Nation*, 295 U.S. 103, 109-111 (1935). The Supreme Court has cautioned that acts of Congress are not to be construed to transfer property rights of one tribe to another where an alternate construction is available. *Chippewa Indians v. United States*, 301 U.S. 358, 375-76 (1937). To conclude that the United States took Quinault rights and thereby diminished Quinault rights for the benefit of other tribes, the Court must find that Congress acted expressly, *see, Menominee Tribe v. United States*, 391 U.S. 404 (1968), or at a minimum that Congress clearly considered the matter and chose to diminish or modify Quinault treaty rights. *United States v. Dion*, 106 S. Ct. 2216, 2220 (1986).

8. Neither the Executive Order of November 4, 1873 enlarging the Quinault Indian Reservation, nor the Act of March 4, 1911 providing for the allotment of the Quinault Reservation, constitutes Congressional action of the kind necessary to transfer Quinault off-reservation treaty fishing rights from the Quinault to the Chehalis and Shoalwater Tribes.

9. This Court has previously held joint occupancy of a reservation is not sufficient to demonstrate the tribal consolidation and unification necessary for a transfer of treaty fishing rights among tribes. *See, United States v. Washington*, Sub. No. 85-1, Order Adopting Special Master's Report and Recommendation, entered Feb. 27, 1989, n. 4 at 19 (Docket No. 11202), *aff'd. sub nom. United States v. Suquamish Indian Tribe*, 901 F.2d 772 (1990). Thus, even if the 1873 Quinault Executive Order had been intended to effect the relocation of the Chehalis and Shoalwater Tribes from the Chehalis and Shoalwater Reservations to

the Quinault Reservation, that would not support a conclusion that the two tribes had acquired Quinault off-reservation treaty fishing rights. Moreover, there is no mention of off-reservation treaty fishing rights in the Executive Order which would support a conclusion that the Order effected a transfer of treaty fishing rights.

10. The Act of March 4, 1911, and its legislative history do not reflect any Congressional intent to appropriate Quinault off-reservation treaty fishing rights and transfer a share of those rights to the Chehalis and Shoalwater Bay Tribes. In the absence of a clear and unequivocal expression of such intent, allotment of Quinault Reservation land to individual Chehalis and Shoalwater Indians does not support the conclusion that Quinault off-reservation treaty rights were transferred to the Chehalis and Shoalwater Bay Tribes. *See United States v. Washington,* Sub. No. 85-1, Order Adopting Special Master's Report and Recommendation, entered Feb. 27, 1989, FF. 396 at 11-12 (Docket No. 11202), *aff'd. sub nom. United States v. Suquamish Indian Tribe,* 901 F.2d at 777 (9th Cir. 1990).

11. The Chehalis and Shoalwater Tribes claim that prior case law has conclusively determined that the Executive Order of 1873 enlarging the Quinault Indian Reservation and the Quinault Allotment Act of March 4, 1911, transferred Quinault treaty fishing rights to the plaintiff tribes through a process of "post treaty affiliation." For the reasons that follow, the Court disagrees.

12. The cases upon which the Chehalis and Shoalwater rely include: *Halbert v. United States,* 283 U.S. 753 (1931) ; *Wahkiakum Band of Chinook Indians v. Bateman,* 655

F.2d 176 (9th Cir. 1981); *Williams v. Clark*, 742 F.2d 549 (9th Cir. 1984); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 129 F.R.D. 171 (W.D. Wash. 1990), *affirmed*, 928 F.2d 1496 (9th Cir. 1991); *Quinaielt Tribe of Indians v. United States*, 102 Ct. Cl. 822 (1945).

13. The prior decisions cited by the Chehalis and Shoalwater Bay Tribes cannot be accorded a preclusive effect in this matter because the issues decided in the prior cases differ from the issue presented here.

14. The issues in *Halbert* as framed by the Supreme Court were:

> The plaintiffs are all of Indian blood and descent, but none is a full-blood Indian. Some are members of the Chehalis, Chinook, and Cowlitz tribes, and the question is presented whether these tribes are among those whose members are entitled to allotments from lands within the Quinaielt Reservation. Many do not personally reside on the reservation, and we are asked to decide whether this defeats their claim. Some are the issue, either children or grandchildren, of a marriage between an Indian woman and a white man, and whether this is an obstacle to allowing their claims is a further question.

Halbert v. United States, 283 U.S. 753, 755-56 (1931). The decision holds that individual Chehalis, Chinook, and Cowlitz are entitled to allotments of land on the Quinault Reservation if without allotments elsewhere, that reservation residence is not a precondition for allotment, and that the issue of marriages of Indian women and white men are not necessarily barred from taking an allotment.

15. The Court's determination that individual Chehalis, Chinook, and Cowlitz are entitled to allotments turns on its construction of language in the Quinault allotment Act of March 4, 1911, authorizing the issuance of allotments,

> "to all members of . . . tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty [with the Quinault, 12 Stat. 971], and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes, *Provided*, That the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed."

Act of March 4, 1911, 36 Stat. 1345. *Halbert*, 283 U.S. at 758-59. The Court held it was appropriate to speak of the Chehalis, Chinook, and Cowlitz, as "affiliated under the treaty" for the purpose of determining the eligibility of individuals for allotment of land under the Act. The Court was not presented with, nor did it address, the claim made here by the Chehalis and Shoalwater Bay Tribes that they share and may independently exercise the tribal off-reservation fishing rights reserved by the tribes party to the treaty.

16. The conclusion that *Halbert* did not involve an issue of tribal fishing rights is strengthened by several factors. The unpublished district court decision in *Halbert* makes it clear that the case involves only individual claims to allotment and does not implicate a claim by a tribe to tribal rights. Indeed, the district court's decision concludes that the Chehalis and Chinook at Oakville and

Shoalwater, the locations of the Chehalis and Shoalwater Reservations, were not tribes. [Ex. QN-M-99 at 25-26.] This conclusion contradicts the suggestion of the Chehalis and Shoalwater Tribes that *Halbert* involved an issue of tribal property rights. Moreover, Judge Cushman, the district judge who heard *Halbert*, subsequently had occasion to address the question of Chinook tribal fishing rights and concluded that the Chinook "have no such rights" under the treaty. *United States v. McGowan*, 2 F. Supp. 426, 438-39 (W.D. Wash. 1931), *aff'd.*, 62 F.2d 955 (9th Cir. 1933), *aff'd. per curiam*, 290 U.S. 592 (1933). (Emphasis added.) The *McGowan* decision indicates that this Court did not view *Halbert* as holding that so-called "affiliated tribes" possess Quinault treaty fishing rights, as a consequence of that characterization.

17. In *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir. 1981), a group claiming to be a successor to the aboriginal Wahkiakum Band of Chinook claimed rights to fish at Chinook usual and accustomed fishing places on the Columbia River under the Treaty with the Quinault. The court rejected the claim, holding that the Treaty with the Quinault only protected and reserved the right to take fish at the fishing grounds of the tribal parties, the Quinault and Quileute, and that the Wahkiakum do not possess standing as a treaty signatory. *Id.* at 179.

18. The *Wahkiakum* court did not have before it the question of Chinook claims to a right to fish at Quinault fishing places. Nevertheless, *in dictum*, the court stated:

> As members of a tribe subsequently affiliated with the Quinault under the treaty, they are however, entitled to share such rights as are

> granted to the original signatories by the treaty. The members of the Wahkiakum, a tribe of fish-eating Indians of the locality, have the opportunity to take an allotment on the Quinault Reservation and to exercise the fishing rights which accompany that allotment. Those fishing rights are secured by Article III which protects the rights of the Quinault and any affiliated tribe to fish at all usual and accustomed Quinault fishing grounds. (Footnote omitted.)

655 F.2d at 179-80.

The Court thus suggests that only individual members who take an allotment on the Quinault Reservation are entitled to exercise Quinault treaty fishing rights. This would not support the far broader claim by the Chehalis and Shoalwater Bay Tribes that all of their members share those Quinault fishing rights. In any event, the above statement by the *Wahkiakum* court was *dictum*. "It is hornbook law that both [collateral estoppel and stare decisis] principles give effect only to matters that have formed an essential basis for the earlier decision." *Matter of Ellis*, 674 F.2d 1238, 1250 (9th Cir. 1982); *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988). The dictum comments of the Court of Appeals are consistent with a requirement that individual Chehalis and Shoalwater enroll in the Quinault Indian Nation if they desire to exercise Quinault treaty rights, an avenue which is available to any person who possesses at least 1/4 Chehalis, Chinook, or Cowlitz ancestry.

19. The other cases upon which plaintiff tribes rely are also distinguishable. *Williams v. Clark*, 742 F.2d 549 (9th Cir. 1984), cited by the Chehalis and Shoalwater Bay

Tribes, involves a claim with respect to a Quileute's rights to inherit from a Quileute decedent an interest in land located on the Quinault Reservation. The Quileute Tribe, unlike the plaintiff tribes, is a party to the Treaty with the Quinault.

Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 129 F.R.D. 171 (W.D. Wash. 1990), *affirmed*, 928 F.2d 1496 (9th Cir. 1991), involves claims by the plaintiff Chehalis and Shoalwater Tribes with respect to the government of the Quinault Reservation. This Court dismissed that case based on the inability of the plaintiffs to join an indispensable party, the Quinault Indian Nation. It therefore expressly declined to address the merits.

Finally, *Quinaielt Tribe of Indians v. United States*, 102 Ct. Cl. 822 (1945), involved a claim by the Quinault Nation against the United States for money damages as the result of the wrongful exclusion of certain lands from the Quinault Reservation. The Claims Court in an interlocutory decision relying on Halbert, held that others shared in the right to recover for the wrongfully omitted reservation lands. The decision does not address the issue of off-reservation fishing rights presented in this case and is readily explained on the basis that had the excluded lands been properly included in the Quinault Reservation they would have been available for allotment to individual Chehalis, Chinook, and Cowlitz allottees under *Halbert*.

20. Based on the foregoing, the Court concludes that the Confederated Tribes of the Chehalis Indian Reservation and the Shoalwater Bay Indian tribe do not share the right reserved by the Quinault in the Treaty with the

Quinault to take fish at Quinault usual and accustomed fishing places.

Claims Based on Executive Orders

21. Off-reservation hunting and fishing rights must be expressly reserved. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 49 (1973); *Organized Village of Kake v. Egan,* 369 U.S. 60, 75-76 (1962). Absent an express reservation of off-reservation rights, Indians engaging in activities beyond reservation boundaries are generally subject to regulation under non-discriminatory state law applicable to all citizens. *Mescalero Apache Tribe v. Jones,* 411 U.S. at 148-49. The Executive Orders establishing the Chehalis and Shoalwater Bay Reservations do not contain the express reservation of off-reservation fishing rights necessary to preserve such rights.

Claims to Aboriginal Fishing Rights

22. Aboriginal title is the right of aboriginal Indian tribes to use and occupy lands which they have continuously and exclusively used and occupied.

23. The right of use and occupancy under aboriginal title included the right to use aboriginal lands for fishing. The right to fish is an incident of aboriginal title.

24. The extinguishment of aboriginal title extinguishes all incidents of aboriginal title and any use rights such as fishing in the aboriginal lands, unless expressly reserved by treaty or federal law.

25. When Congress appropriated money to pay an award of the Indian Claims Commission for the past

extinguishment of aboriginal title, Congress confirmed that the aboriginal title of the group to whom the award was made was in fact extinguished.

26. By appropriating money to pay the I.C.C. award for the extinguishment of aboriginal title of the Upper Chehalis, Lower Chehalis, Satsop, Humptulips, and other Indians who made the claim in *Upper Chehalis Tribe, et al. v. United States,* I.C.C. docket No. 237, Congress confirmed that the aboriginal title of those aboriginal Indians had been extinguished.

27. By appropriating money to pay the I.C.C. award for the extinguishment of aboriginal title of the Cowlitz Indians who made the claim in *Plamondon ex. rel. Cowlitz Tribe v. United States,* I.C.C. docket No. 218, Congress confirmed that the aboriginal title of those aboriginal Indians had been extinguished.

28. By appropriating money to pay the I.C.C. award for the extinguishment of aboriginal title of the Chinook Indians who made the claim in *Chinook Tribe and Band v. United States,* I.C.C. docket No. 234, Congress confirmed that the aboriginal title of those aboriginal Indians had been extinguished.

29. By appropriating money to pay the award of the I.C.C., Congress confirmed that the United States had extinguished aboriginal title, including any aboriginal fishing rights, of the aboriginal tribes whose aboriginal title was found to have been taken in an I.C.C. award.

30. Plaintiff tribes did not show that any incident of aboriginal title or fishing right was expressly or otherwise exempted from the extinguishment of the aboriginal

title of the Upper Chehalis, Lower Chehalis, Satsop, Humptulips, Cowlitz, Chinook, or any other aboriginal Indian tribe where the extinguishment has been confirmed by the payment of an award of the I.C.C. Plaintiff tribes do not possess any unextinguished aboriginal fishing rights of those aboriginal tribes.

31. The Act of August 24, 1912, paid compensation to the descendants of the signatories of the unratified 1851 treaties with the Wahkiakum Band of Chinook, the Wheelapa Band of Chinook, and the Lower Band of Chinook. By the Act of August 24, 1912, Congress confirmed that it had previously extinguished all aboriginal title, including fishing rights, of the Wahkiakum Band of Chinook, Wheelapa Band of Chinook, the Kwalioqua, and the Lower Band of Chinook. Plaintiff tribes do not possess any unextinguished aboriginal fishing rights of these aboriginal tribes.

32. The Act of August 24, 1912, paid compensation to the descendants of the signatories of the unratified 1851 treaties with the Wahkiakum Band of Chinook, the Wheelapa Band of Chinook, and the Lower Band of Chinook. By the Act of August 24, 1912, Congress confirmed that it had extinguished all aboriginal title, including fishing rights, in the lands that would have been ceded or reserved under those treaties, including Shoalwater (or Willapa) Bay and its environs, for a distance of 60 miles up the Columbia River. Plaintiff tribes do not possess aboriginal title and fishing rights to the lands that would have been ceded or reserved under those treaties, including Shoalwater (or Willapa) Bay and its environs, for a distance of 60 miles up the Columbia River.

33. The opening of lands for sale to non-Indians and to possession by non-Indians was inconsistent with continued exclusive use and occupancy by the aboriginal tribes and, to the extent that aboriginal title was not extinguished previously, the presidential proclamation of 1863 extinguished all remaining aboriginal title in southwest Washington including any aboriginal fishing rights that may have existed. Plaintiff tribes do not possess any unextinguished aboriginal fishing rights in southwest Washington.

34. Plaintiff tribes did not prove that they possess any unextinguished aboriginal fishing rights and the court hereby declares that they do not have a right to take fish free of state regulation off their respective reservations in the Chehalis River and Gray's Harbor systems, nor in Willapa Bay, nor the rivers and streams draining into that bay, nor the waters adjacent to that bay.

35. Because the Court concludes that the Chehalis, Chinook, and Cowlitz retained no aboriginal rights to fish outside of the Chehalis or Shoalwater Reservations, it is unnecessary for the Court to determine the usual and accustomed fishing places of those groups, or to which, if any, of those groups the Chehalis and Shoalwater plaintiffs are successors in interest.

Summary

36. The rights of the Chehalis Tribe and the Shoalwater Bay Tribe to fish off their respective reservations are the same as the rights of every other citizen. They enjoy no additional rights by virtue of the Executive Orders establishing their reservations, or the aboriginal

rights of any tribe, or any relationship with the Quinault Indian Nation.

DATED this 26th day of May, 1991.

/s/ Robert E. Coyle
Chief United States
District Judge

Recommended for entry this
3 day of October, 1991.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate Judge

APPENDIX D

Honorable Barbara J. Rothstein
Magistrate Judge John L. Weinberg

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CONFEDERATED TRIBES OF CHEHALIS INDIAN RESERVATION, et al., Plaintiffs, v. STATE OF WASHINGTON et al., Defendants, and UNITED STATES OF AMERICA, Plaintiff, v. STATE OF WASHINGTON, Defendant.	No. C83-117T(C) and No. 9213 - Phase I Subproceeding No. 83-3 ORDER FOR FINAL JUDGMENT PURSUANT TO RULE 54(B) (Filed Mar. 8, 1995)

This is to certify, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that the undersigned hereby directs the entry of a final judgment upon the Order filed May 18, 1992, the findings of fact and conclusions of law filed May 29, 1992, and the Order dated July 2, 1993 which order shall constitute the findings of fact and conclusions of law with respect to the Chehalis

boundary diminishment matter. The undersigned expressly determines that there is no just reason for delay and expressly directs the entry of such judgment. Certification will aid expeditious decision of the case.

Ordered, that final judgment be entered on these orders and these findings of fact and conclusions of law effective this date.

DATED this 8th day of March 1995.

/s/ Barbara J. Rothstein
United States
District Judge

/s/ John L. Weinberg
Recommended for Entry this
1 day of March 1995
John L. Weinberg
United States Magistrate Judge

Presented by:

/s/ Jeffrey S. Schuster
Jeffrey S. Schuster
WSBA No. 7398
Evergreen Legal Services
Native American Project
Attorney for the Shoalwater
Bay Indian Tribe

/s/ Harold Chesnin by RAS*
Harold Chesnin
WSBA No. 398
Mathews, Garlington-Mathews &
Chesnin
Attorney for the
Confederated Tribes of the
Chehalis Indian Reservation

/s/ Richard Reich by RAS*
Richard Reich
Attorney for the Quinault
Indian Nation

/s/ Peter C. Monson by RAS*
Peter C. Monson, AUSA
U.S. Dept. of Justice
Indian Resources Section
Environmental & Natural
Resources Division

/s/ Robert K. Costello by RAS*
Robert K. Costello
Jay D. Geck
Assistant Attorneys General

/s/ Bill Tobin by RAS*
Bill Tobin
Attorney for the Nisqually Tribe

/s/ Kevin Lyon by RAS*
Kevin Lyon
Attorney for the Squaxin Island Tribe

/s/ Nettie L. Alvarez by RAS*
Nettie L. Alvarez
Attorney for the Hoh Tribe

/s/ Mason D. Morisset by RAS*
Mason D. Morisset
Attorney for the Tulalip Tribes

/s/ Annette M. Klapstein by RAS*
Annette M. Klapstein by RAS
Attorney for the Puyallup Tribe

/s/ Richard Davies by RAS*
Richard Davies
Attorney for the Quileute Tribe

* Per Telephone confirmation

Honorable Barbara J. Rothstein
Magistrate Judge John L. Weinberg

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CONFEDERATED TRIBES OF CHEHALIS INDIAN RESERVATION, et al., Plaintiffs, v. STATE OF WASHINGTON et al., Defendants, and UNITED STATES OF AMERICA, Plaintiff, v. STATE OF WASHINGTON, Defendant.	No. C83-117T(C) and No. 9213 - Phase I Subproceeding No. 83-3 PARTIAL JUDGMENT IN A CIVIL CASE PURSUANT TO FED. R. CIV. P. 54(b) (Filed Mar. 23, 1995)

IT IS ORDERED AND ADJUDGED that:

Partial final judgment is hereby entered upon the Order filed May 18, 1992, the findings of fact and conclusions of law filed May 29, 1992, and the Order dated July 2, 1993 which order shall constitute the findings of fact and conclusions of law with respect to the Chehalis boundary diminishment matter.

DATED this 17th day of March, 1995

Bruce Rifkin
Clerk of the Court

By /s/ Nealann Skari
Nealann Skari,
Deputy Clerk

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES OF CHEHALIS INDIAN RESERVATION, Plaintiff-Appellant, Cross-Appellee, and SHOALWATER BAY INDIAN TRIBE, Plaintiff-Appellant, v. STATE OF WASHINGTON; WILLIAM R. WILKERSON, individually and as Acting Director of the State of Washington Department of Fisheries; FRANK R. LOCKARD, individually and as Director of the State of Washington Department of Game; WASHINGTON STATE GAME COMMISSION, Defendants-Appellees, and	Nos. 95-35370 95-35371 D.C. No. CV-83-00117-BJR ORDER (Filed Nov. 21, 1996)

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
STATE OF WASHINGTON,)
)
Defendant-Appellee,)
Cross-Appellant.)

Before: WRIGHT, BEEZER and O'SCANNLAIN, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judge O'Scannlain has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for a rehearing en banc is **REJECTED**.

APPENDIX F

Shoalwater Reserve.

EXECUTIVE MANISON, *September 22, 1866.*

Let the tract of land as indicated on the within diagram be reserved from sale and set apart for Indian purposes, as recommended by the Secretary of the Interior in his letter of the 18th instant, said tract embracing portions of sections 2 and 3 in township 14 north, range 11 west, Washington Territory.

ANDREW JOHNSON.

APPENDIX G

WASHINGTON.

Chehalis Reserve.

DEPARTMENT OF THE INTERIOR,
Office of Indian Affairs, May 17, 1864.

SIR: I have the honor to submit for your direction in the premises sundry communications and papers from Superintendent Hale in reference to a proposed reservation for the Chehalis Indians in Washington Territory.

The condition of these Indians has been the subject of correspondence between this office and the superintendent of Indian affairs in Washington Territory for several years. It will be seen by Superintendent Hale's letter of July 3, 1862, that the country claimed by these Indians is large, comprising some 1,500 square miles; that they have never been treated with, but that the Government has surveyed the greater part of it without their consent and in the face of their remonstrances, and the choicest portions of their lands have been occupied by the whites without any remuneration to them, and without their consent or having relinquished their claim or right to it. They have been thus crowded out and excluded from the use of the lands claimed by them and those which they have heretofore cultivated for their support. This has caused much dissatisfaction and threatens serious trouble, and they manifest a determination not to be forced from what they claim as their own country. After various

propositions made to them by Superintendent Hale, looking to their removal and joint occupation of other Indian reservations, to all which they strenuously objected, they expressed a willingness to relinquish all the lands hitherto claimed by them, provided they shall not be removed, and provided that a sufficient quantity of land shall be retained by them at the mouth of the Black River as a reservation.

The selection herein made in accordance with their wishes, and approved by Superintendent Hale, reduces the dimensions of their former claim to about six sections of land, with which they are satisfied, and which selection has been submitted to this office for its approval. There seems one drawback only to this selection, and that is one private land claim – that of D. Mounts – which it is proposed to purchase. The price asked is $3,500, which he considers not unreasonable. (See his communication of March 30, 1863, and accompanying papers.)

There is remaining on hand of the appropriation for "intercourse with various Indian tribes having no treaties with the United States" the sum of $3,980.12, a sufficient amount of which I have no doubt might appropriately be applied for the purpose indicated. (See U.S. Statutes at Large, vol. 12, page 792.)

I am of the opinion that the proposition is a fair one for the Government, and as it is satisfactory to the Indians interested, I see no objection to its approval by the Department, especially so when it is considered that it will peaceably avert impending trouble.

As recommended in the letters herewith submitted, it will also be necessary, doubtless, to made some provision

for them after they shall have been assured of the quiet and permanent possession of the proposed reservation for a future home. But this may subsequently receive the attention of the Department. These Indians are represented to be in a very hopeful condition. They wish to abandon a roving life; to establish themselves in houses and cultivate their lands; to educate their children, and live peaceably with all.

These papers are submitted for your information in considering the subject, and if it shall commend itself to your judgment, for the approval of the proposed selection as a reservation for these Indians and the purchase of the private land claim of D. Mounts thereon.

Very respectfully, your obedient servant,

WM. P. DOLE, *Commissioner.*

Hon. J. P. USHER,
Secretary of the Interior.

[Inclosures.]

Boundaries of the Chehalis Indian Reservation, as compiled from the field-notes of the public surveys in the office of the surveyor-general of Washington Territory, beginning at the post-corner to sections 1 and 2, 35 and 36, on the township line between townships Nos. 15 and 16 north, of range 4 west of the Willamette meridian, being the northeast corner of the reservation; thence west along the township line 240 chains to the post-corner to sections 4, 5, 32, and 33; thence north on line between sections 32 and 33, 26.64 chains, to the southeast corner of James H. Roundtree's donation claim; thence west along

the south boundary of said claim 71.50 chains to its southwest corner; thence north on west boundary of the claim 13.10 chains; thence west 8.50 chains to the quarter-section post on line of sections 31 and 32; thence north along said section line 40.00 chains to the post-corner to sections 29, 30, 31, and 32; thence west on line between sections 30 and 31, 25 and 36, 101.24 chains to the Chehalis River; thence up the Chehalis River with its meanderings, keeping to the south of Sand Island, to the post on the right bank of the river, being the corner to fractional sections 1 and 2; thence north on the line between sections 1 and 2, 73.94 chains to the place of beginning.

The copy of the field-notes in full, as taken from the record of the public surveys now on file in this office, and from which the above is compiled, is duly certified as being correct by the surveyor-general of the Territory.

OFFICE SUPERINTENDENT INDIAN AFFAIRS,
Olympia, Wash., December 10, 1863.

The within and foregoing boundaries, as described in the notes and accompanying diagram of the proposed Chehalis Indian Reservation, are approved by me as correct, and being in accordance with instructions given by me, the same being subject to the approval of the Commissioner of Indian Affairs.

C. H. HALE,
Superintendent of Indian-Affairs, Washington Territory.

DEPARTMENT OF THE INTERIOR,
Washington D. C., July 8, 1864.

SIR: I return herewith the papers submitted with your report of the 17th May last in relation to a proposed reservation for the Chehalis Indians in Washington Territory.

I approve the suggestion made in relation to the subject, and you are hereby authorized and instructed to purchase the improvements of D. Mounts, which are on the lands selected for the reservation, if it can now be done for the price named for them, viz, $3,500, including the crops grown or growing this season upon the premises.

Very respectfully, your obedient servant.

J. P. USHER, *Secretary.*

WILLIAM P. DOLE, *Esq.,*
Commissioner of Indian Affairs.

NOTE. – D. Mounts was paid for his improvements by Superintendent Waterman, January 6, 1865.

APPENDIX H

Treaty of Olympia

Treaty between the United States and the Qui-nai-elt and Quil-eh-ute Indians. Concluded on the Qui-nai-elt River, in the Territory of Washington, July 1, 1855, and at the city of Olympia, January 25, 1856. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded on the Qui-nai-elt River, in the Territory of Washington, on the first day of July, one thousand eight hundred and fifty-five, and at the city of Olympia also in said Territory, on the twenty-fifth day of January, one thousand eight hundred and fifty-six, between Isaac. I. Stevens, governor and superintendent of Indian affairs in the Territory aforesaid, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them; which treaty is in the words and figures following, to wit: –

Articles of agreement and convention made and concluded by and between Isaac I. Stevens, governor and superintendent of Indian affairs, of the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute

Indians, on the part of said tribes and bands, and duly authorized thereto by them.

ARTICLE I. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mounts; thence southerly with said range of mountains to their intersection with the dividing ridge between the Chehalis and Quiniatl Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning.

ARTICLE II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the

owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

ARTICLE III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privileges of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of twenty-five thousand dollars, in the following manner, that is to say: For the first year after the ratification hereof, two thousand five hundred dollars; for the next two years, two thousand dollars each year; for the next three years, one thousand six hundred dollars each year; for the next four years, one thousand three hundred dollars each year; for the next five years, one thousand dollars each year; and for the next five years, seven hundred dollars each year. All of which sums of money shall be applied to the use and benefit of the said Indians under the directions of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer,

shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE V. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States, further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this

treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE VIII. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens; and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as is prescribed in this article in cases of depredation against citizens. And the said tribes and bands agree not to shelter or conceal offenders against the laws of the United States, but to deliver them to the authorities for trial.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his

or her proportion of the annuities withheld from him or her, for such time as the President may determine.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to the children of said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and to employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance to be defrayed by the United States, and not deducted from their annuities.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside on their reservations without consent of the superintendent or agent.

ARTICLE XIII. This treaty shall, be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at Olympia, January 25, 1856, and on the Qui-nai-elt River, July 1, 1855.

ISAAC I. STEVENS, *Governor and Sup't of Indian Affairs.*

TAH-HO-LAH, his x mark. [L. S.]
Head Chief of Qui-nite-l tribe,
HOW-YAT'L, his x mark. [L. S.]
Head Chief Quil-ley-yute tribe,
KAL-LAPE, his x mark. [L. S.]
Sub-chief, Quil-ley-hutes,
TAH-AH-HA-WHT'L, his x mark. [L. S.]
Sub-chief Quil-ley-hutes,
LAY-LE-WHASH-ER, his x mark. [L. S.]
E-MAH-LAH-CUP his x mark. [L. S.]
ASH-CHAK-A-WICK, his x mark. [L. S.]
AY-A-QUAN, his x mark. [L. S.]
YATS-SEE-O-KOP, his x mark. [L. S.]
KARTS-SO-PA-AH, his x mark. [L. S.]
QUAT-A-DE-TOT'L, his x mark. [L. S.]
NOW-AH-ISM, his x mark. [L. S.]
CLA-KISH-KA, his x mark. [L. S.]
KLER-WAY-SR-HUN, his x mark. [L. S.]
QUAR-TER-HEIT'L, his x mark. [L. S.]
HAY-NEE-SI-OOS, his x mark. [L. S.]
HOO-E-YAS'LSEE, his x mark. [L. S.]
QUILT-LE-SE-MAH, his x mark. [L. S.]
QUA-LATS-KAIM, his x mark. [L. S.]
YAH-LE-HUM, his x mark. [L. S.]
JE-TAH-LET-SHIN, his x mark. [L. S.]

MA-TA-A-HA, his x mark. [L. S.]
WAY-KEE-NAH, his x mark. [L. S.]
Sub-chief Qui-nite'l tribe,
YER-AY-LET'L, his x mark. [L. S.]
Sub-chief,
SILLEY MARK'L, his x mark. [L. S.]
CHER-LARK-TIN, his x mark. [L. S.]
HOW-YAT-'L, his x mark. [L. S.]
KNE-SHE-GUARTSH, his x mark. [L. S.]
Sub-chief,
KLAY-SUMETZ, his x mark. [L. S.]
KAPE, his x mark. [L. S.]
HAY-ET-LITE-'L, his x mark. [L. S.]
or John,

Executed in the presence of us; the words "or tracts," in the II. article, and "next," in the IV. article, being interlined prior to execution.

M.T. SIMMONS
Special Indian Agent
H. A. GOLDSBOROUGH,
Commissary, &c.
B.F. SHAW,
Interpreter.
JAMES TILTON,
Surveyor-General Washington Territory.
F. KENNEDY.
J. Y. MILLER.
H.D. COCK.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise

and consent to the ratification of the same by a resolution in the words and figures following, to wit: –

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians in Washington Territory, signed 1st day of July, 1855, and 25th day of January 1856.

"Attest: "ASBURY DICKINS, *Secretary*."

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March the eighth, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this Eleventh day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States the eighty-third.

[SEAL.]

JAMES BUCHANAN.

By the President:

LEWIS CASS, *Secretary of State.*